138
FILE COPY

(1)

Supreme Court, U.S.
FILED
09-276 SEP 1 - 2009
OFFICE OF THE CLERK

No. 09-

IN THE SUPREME COURT OF THE UNITED STATES

LIBERTY COUNSEL, a Florida corporation, on behalf of its employee and affiliate members of The Florida Bar; ANITA L. STAVER, SCOTT C. DIXON,

Petitioners

v.

THE FLORIDA BAR BOARD OF GOVERNORS; JOHN G. WHITE III, Florida Bar President; JOHN F. HARKNESS, JR., Executive Director of the Florida Bar,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Mathew D. Staver
(counsel of record)
LIBERTY COUNSEL
PO Box 540774
Orlando, FL 32854-0774
(800) 671-1776 Telephone
(407) 875-0770 Facsimile
Attorney for Petitioners

Stephen M. Crampton
Mary E. McAlister
LIBERTY COUNSEL
PO Box 11108
Lynchburg, VA 24506
(434) 592-7000 Telephone
(434) 592-7700 Facsimile
Attorneys for Petitioners

QUESTIONS PRESENTED

The Florida Bar, an integrated bar which requires membership and annual dues as a prerequisite for practicing law, voted to permit its Family Law Section to file an amicus curiae brief in support of the invalidation of Florida's law prohibiting homosexuals from adopting. Despite two earlier rulings that the issue of homosexual adoption was too divisive and therefore an improper subject for political or ideological activities, and without waiving its requirement that sections cannot get involved in divisive issues, the Bar's Board of Governors (the "Board") voted to permit the section to file the brief. Sections are established, controlled and abolished at the discretion of the Board. Sections have voluntary membership and voluntary dues, but the Bar financially supports the sections at the rate of $10.00 per section member if administrative costs exceed the $17.50 per member that the Bar charges sections.

The Florida Supreme Court concluded that *Keller v. State Bar of California*, 496 U.S. 1 (1990) does not apply to activities undertaken by bar sections, so the Bar did not violate Petitioners' First Amendment rights. The Court held that any expenditure of mandatory Bar dues for the amicus brief would be "*de minimis*" and therefore not raise First Amendment concerns. The questions presented for review are:

1. Whether the First Amendment rights of attorneys who are compelled to join and pay dues to an integrated state bar as a condition of practicing law in the state, as established in *Keller v. State Bar of California*, 496 U.S. 1 (1990), are violated when the licensing bar

permits a section that it creates and controls, and which receives at least "*de minimis*" funds from mandatory dues, to engage in political and ideological activities which are unrelated to the regulation of the legal profession or improving the quality of legal services.

2. Whether an integrated bar that requires mandatory dues from attorneys as a condition of practicing their profession may refuse to comply with its own accounting rules and procedural safeguards mandated by the First and Fourteenth Amendments, as described in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), and deny its members an accounting of expenditures regarding political and ideological activities unrelated to regulation of the legal profession or improving the quality of legal services merely by claiming that the activities engaged in by the bar section were supported by voluntary dues or that the mandatory membership dues to support the section activity were "*de minimis*."

3. Whether the Florida Supreme Court properly concluded that a "*de minimis*" expenditure of mandatory dues for an amicus brief on a political and ideological issue unrelated to regulation of the legal profession or improving the quality of legal services prepared by a section created and supervised by the Bar would not implicate bar members' First Amendment rights under *Keller*, despite this Court's holding in *Hudson, International Association of Machinists v. Street*, 367 U.S. 740 (1961) and their progeny.

PARTIES

Petitioners are Liberty Counsel a Florida corporation, on behalf of its employee and affiliate members of The Florida Bar, ANITA L. STAVER, president of Liberty Counsel and a member of the Florida Bar, and SCOTT C. DIXON, an affiliate attorney with Liberty Counsel and a member of the Florida Bar. There is no parent corporation or publicly held corporation holding 10 percent or more of the stock of any Petitioner.

Respondents are the Florida Bar Board of Governors; John G. White III, Florida Bar President; and John F. Harkness, Jr., Executive Director of the Florida Bar.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 8

I. THE FLORIDA SUPREME COURT'S DECISION THAT THE FIRST AMENDMENT RIGHTS ESTABLISHED IN *KELLER* DO NOT APPLY TO SECTIONS CREATED AND CONTROLLED BY MANDATORY BARS CONFLICTS WITH THIS COURT'S PRECEDENTS. 10

II. THE FLORIDA SUPREME COURT'S RULING THAT THE FLORIDA BAR DID NOT VIOLATE PETITIONERS' FIRST AMENDMENT RIGHTS WHEN IT REFUSED TO MAKE AN ACCOUNTING OF THE EXPENDITURES ASSOCIATED WITH THE SECTION'S IDEOLOGICAL ACTIVITY BECAUSE ANY SUCH EXPENDITURES WERE "*DE MINIMIS*" CONTRADICTS THIS COURT'S PRECEDENTS. 19

III. THE FLORIDA SUPREME COURT'S CONCLUSION THAT A "*DE MINIMIS*" EXPENDITURE OF MANDATORY BAR DUES FOR A SECTION'S POLITICAL AND IDEOLOGICAL ACTIVITIES DOES NOT IMPLICATE THE FIRST AMENDMENT CONFLICTS WITH THIS COURT'S LONG-ESTABLISHED PRECEDENTS. 24

CONCLUSION 28

TABLE OF AUTHORITIES

FEDERAL CASES

Abood v. Detroit Bd. of Educ.,
431 U.S. 209 (1977) 9, 12, 19, 24-26

Chicago Teachers Union v. Hudson,
475 U.S. 292 (1986) ..... ii, 10, 12, 20, 27

Ellis v. Railway Clerks,
466 U.S. 435 (1984) 9, 12,13, 19, 20, 27

Gibson v. The Florida Bar,
906 F.2d 624 (11th Cir. 1990) 8, 20

International Association of Machinists v. Street,
367 U.S. 740 (1961) ..... ii, 9, 11, 12, 25

Keller v. State Bar of California,
496 U.S. 1 (1990) i, 6,10, 11, 13, 14, 17, 20, 24, 27

Railway Employes' Dept. v. Hanson,
351 U.S. 225 (1956) 11

N.L.R.B. v. General Motors,
373 U.S. 734 (1963) 9

STATE CASES

Florida Bar re Frankel,
581 So. 2d 1294 (Fla. 1991) 7, 8, 15,16, 21

Florida Bar re Schwarz,
552 So.2d 1094 (Fla. 1989) 7, 16

Jeb Bush v. Michael Schiavo,
865 So.2d 321 (Fla. 2004) 5

Keller v. State Bar of California,
47 Cal.3d 1152 (1989) 14

Petition of Florida State Bar Ass'n,
40 So.2d 902 (Fla. 1949)(en banc) 3

FEDERAL STATUTES

28 U.S.C. §1257(a) 3

U.S. Const. amend. I 1

U.S. Const. amend. XIV 2

STATE STATUTES

Florida Statutes §63.042(3) 5

OPINIONS BELOW

The opinion of the Supreme Court of Florida (App 1a-30a) is reported at 12 So.3d 183 (Fla. 2009).

JURISDICTION

The judgment of the Supreme Court of Florida was filed on June 4, 2009. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the

laws.

U.S. CONST. amend. XIV, § 1.

Rules Regulating the Florida Bar (relevant sections) are reproduced in Appendix B (App., 31a-41a).

Bylaws of the Family Law Section (relevant section) are reproduced in Appendix C (App., 42a).

Standing Policies of The Florida Bar (relevant sections) are reproduced in Appendix D (App., 43a-51a).

STATEMENT OF THE CASE

At issue in this case is whether the First Amendment protections afforded to members of mandatory bars under *Keller* are infringed when sections created and controlled by the bar engage in political and ideological activities unrelated to the regulation of the legal profession or improving the quality of legal services. The Florida Supreme Court's conclusion that *Keller* does not apply to sections permits the Bar to circumvent *Keller* by creating sections, permitting them to engage in the activities that are off limits to the Bar, and justifying the actions under the guise that the sections are "voluntary" because section membership and dues are voluntary, and mandatory dues to support the sections are "*de minimis*." The Florida Supreme Court further undermined the First Amendment protections afforded under *Keller* by concluding that any "*de minimis*" use of mandatory bar dues for sections' ideological and political activities does not raise First Amendment concerns.

The Florida Bar ("the Bar") is an integrated bar that requires licensed attorneys to join and pay mandatory dues as a condition of practicing law in the state. *Petition of Florida State Bar Ass'n*, 40 So.2d 902 (Fla. 1949)(en banc). The Bar is created by and is an arm of the Florida Supreme Court. (Rules Regulating the Florida Bar ("Bar Rules"), Introduction, App., 31a). The Bar is governed by the Board, which has the authority to create and abolish sections as it deems necessary or desirable. (Bar Rule 1-4.5, App., 32a; Bylaws of The Florida Bar ("Bar Bylaws") 2-7.3, App., 33a). Membership in and payment of dues to sections are voluntary. (App., 11a). However, sections are "an integral part of The Florida Bar" and are obligated to "work in cooperation with the board of governors and under its supervision toward accomplishment of the aims and purposes of The Florida Bar and of that section or division." (Bar Bylaws 2-7.2, App., 33a). The Family Law Section is one of 21 sections created pursuant to Rule 1-4.5 and Bylaw 2-7.3. (Bar Bylaws 2-7.3, App. 33a-34a). The Family Law Section's bylaws provide that it may not take any action "contrary to the policies of The Florida Bar established by the board of governors." (Bylaws of the Family Law Section of The Florida Bar, ("Section Bylaws") art. X, §5, App., 42a).

The Bar Bylaws provide that the Board shall adopt and may repeal or amend rules of procedure governing the legislative activities of The Florida Bar, and that the adoption of any legislative position requires an affirmative vote of two-thirds of those present and voting at any regular meeting of the board or two-thirds of the executive committee, or by the president. (Bar Bylaws 2-9.3(a) App., 37a). Positions adopted by the Bar are to be published in the Florida Bar News, in the issue immediately following the meeting at which the

positions were adopted. (Bar Bylaws 2-9.3(b) App., 37a). The Bar has also established a procedure for members who object to legislative positions adopted by the Bar. (Bar Bylaws 2-9.3(c) App., 37a-38a). Under that procedure, any member may file a written objection within 45 days of the date of publication of notice of adoption of a legislative position. (Bar Bylaws 2-9.3(c)(1)App., 37a-38a). After the written objection has been received, the executive director of the Bar is to promptly determine the pro rata amount of the objecting member's fees at issue and place that amount in escrow pending determination of the merits of the objection. (Bar Bylaws 2-9.3(c)(2) App., 38a). The Board has 45 days in which to decide whether to give a pro rata refund or refer the matter to arbitration. (Bar Bylaws 2-9.3(c)(3) App., 38a).

The Board is also required to adopt standing board policies to govern the internal operation and administration of the Bar and Board. (Bar Bylaw 2-9.2, App., 36a). The policies adopted by the Board include policies regarding administrative support to sections, amicus curiae filings by sections and legislative and political actions by sections. (Appendix D, App., 43a-51a). Administrative support policies provide that the Bar will charge sections $17.50 per paying member to reimburse the Bar for administrative support costs. (Standing Policy 5.63(a), App., 43a, generally referenced at note 11 of the Supreme Court's decision, App., 11a). If a section's administrative support costs exceed $17.50 per member, then the Bar provides support to the section at the rate of $10.00 per section member for the first 1,000 members. (Standing Policy 5.63 (c), App., 44a).

The standing policy regarding amicus curiae briefs provides that a section may adopt a position and submit an

amicus curiae brief only when the issue is beyond the scope of permissible legislative or ideological activity of the Bar or is within the permissible legislative or ideological activity and the brief does not take a position that is inconsistent with an official position of the Bar. (Standing Policy 8.10(a)(1), App., 45a). Sections cannot adopt a position or submit an amicus brief unless the issue involved is within the area of subject matter interest of the section and is not one that "carries the potential of deep philosophical or emotional division among a substantial segment of the membership of the Bar." (Standing Policy 8.10(a)(3), 9.50(a)(3), App., 45a, 48a). Sections are required to provide notice and a draft of the proposed brief to the board and are prohibited from filing a motion for leave to file or the proposed brief without the express consent of the Board. (Standing Policy 8.10(a)(4), (5), App., 46a-47a).

The Board has applied those policies consistently with *Keller* on several occasions, including two prior occasions involving Florida's statutory prohibition against homosexuals adopting children, Florida Statutes §63.042(3), the same statute at issue in this case. In 2004, the Board's Executive Committee denied the Elder Law Section's request to file an amicus brief regarding right to privacy, but permitted a brief on separation of powers in *Jeb Bush v. Michael Schiavo*, 865 So.2d 321 (Fla. 2004). (Board Minutes August 13, 2004, Appendix E, App., 60a). The Board determined that the right of privacy issue was outside the purpose of the Bar and therefore impermissible, but the separation of powers argument fell within the Bar's purposes and was therefore permissible. (App., 60a). In 2004, the Board rejected the Family Law Section's request to lobby for the repeal of Section 63.042(3) specifically because the Board determined

that the issue of homosexual adoption had the potential of creating a deep philosophical and emotional divide among members of the Bar. (App., 21a-22a). In 2005, the Board again determined that the issue of homosexual adoption was divisive and denied the Family Law Section's request to advocate for a loosening of the prohibition so that some homosexuals would be permitted to adopt. (App., 22a).

However, when considering the Family Law Section's most recent proposal to overturn the ban on homosexual adoption on January 30, 2009, the Board did not determine that the issue was no longer divisive, nor even acknowledge that it was required to make that determination. (App., 22a-23a). Instead, Board members spoke in support of the Section's proposed position and of "sending a message" to Floridians about "doing the right thing." (App., 23a). The Board then voted in favor of the Section's request. (App., 22a-23a).

Petitioners, Liberty Counsel, a nonprofit public interest law firm, its president and an affiliate attorney who are members of The Florida Bar, objected to the Board's action in writing. Petitioners received a written rejection from the Bar's president. Petitioners then filed a petition seeking injunctive relief and other extraordinary relief from the Florida Supreme Court, alleging that the Board's action violated bar members' First Amendment rights under *Keller v. State Bar of California*, 496 U.S. 1 (1990) and constituted an ultra vires act. Petitioners sought relief based upon the standing policies that prohibit sections from filing an amicus brief on any issue that "carries the potential of deep philosophical or emotional division among a substantial segment of the membership of the bar," and the judicial

precedents of *Keller, Florida Bar re Schwarz*, 552 So.2d 1094 (Fla. 1989) and *Florida Bar re Frankel*, 581 So. 2d 1294 (Fla. 1991).

The Florida Supreme Court denied relief. The Court concluded that "voluntary sections" are not bound by *Keller* and *Schwarz*. (App., 12a). The Court further held that since the brief would be written by non-Bar counsel on a pro bono basis, then any expenditure of mandatory dues would be "*de minimis* and not amount to the sort of dues-financed activity that raised the First Amendment concerns set forth in *Keller*." (App., 11a n.11). The Court also denied relief on the Petitioners' claim that the board's actions were ultra vires even though it acknowledged that neither the Section nor the Board strictly complied with the rules or standing policies. (App., 19a-20a).

Two justices dissented on the ultra vires issue, stating that the Court should require the Bar to comply with its own rules. (App., 21a-30a). The dissent noted that "the issue of homosexual adoption is undeniably divisive. The Florida Bar does not argue otherwise. The majority opinion does not hold otherwise." (App., 21a). Even though the issue is divisive, the Board could have voted to waive the provisions of Standing Board Policy 8.10(a)(3) with a two-thirds vote, but failed to do so. (App., 23a-24a). The dissent noted that such a vote would be the only way to act in contravention of the Bar's Bylaws, and contrary to the majority's conclusion, there is no provision for an implicit waiver of the policy. (App., 25a). The majority had said that it did not want to micro-manage the Bar, to which the dissent responded, "this Court is not micromanaging the affairs of the Bar by requiring it to comply with the bylaws approved by this Court." (App., 25a). "As the

administrative head of the Bar, this Court not only has the authority, but the duty, to require the Bar to follow its own bylaws and policies." (App., 27a). "[W]e simply cannot abdicate our duty to supervise the Bar." (App., 30a).

This is not the first time that the Florida Bar has been before this Court on issues related to its use of members' mandatory dues. As discussed below, this Court accepted certiorari on a case from the Eleventh Circuit which also involved a Bar member's challenge to the Bar's objection procedures for the use of dues for ideological activities. *Gibson v. The Florida Bar,* 906 F.2d 624 (11th Cir. 1990) *cert. granted,* 499 U.S. 918 (1991), *cert. denied as improvidently granted*, 504 U.S. 104 (1991). This Court dismissed the petition after hearing oral argument following the Florida Supreme Court's decision in *The Florida Bar re Frankel*, 581 So. 2d 1294 (Fla. 1991). Constitutional issues raised by this Court during that argument, which the Bar represented as being resolved, were not and are back before this Court in the present Petition.

Petitioners respectfully submit that the Court not only abdicated its duty to supervise the Bar, but also its obligation to protect the First Amendment rights of all Floridians, and particularly those who are required to join and pay dues to the Bar in order to practice their profession. Petitioners request that this Court grant their petition to correct the significant constitutional errors present in the Florida Supreme Court's decision.

REASONS FOR GRANTING THE PETITION

Even though "closed shops" were abolished in1947,

lawyers in states with integrated bars are still subject to many of the same restrictions as were workers who were forced to be union members prior to passage of the Taft-Hartley Act. *See N.L.R.B. v. General Motors*, 373 U.S. 734, 740 (1963) (describing Congress' intent to abolish closed shop agreements by adding certain language to Section 8(3) of the act). Since the passage of Taft-Hartley, workers can be required to pay "agency fees" as their fair share of the costs of a union's collective bargaining efforts, but cannot be compelled to join the union. *Id.* However, lawyers who want to practice their profession in a state with an integrated bar must both join the state bar and pay annual membership dues. Unions cannot deprive skilled tradesmen of their livelihoods if they fail to join the union. By contrast, state bars can prevent a lawyer from engaging in the practice of law in any capacity within the state if the lawyer does not join the bar and pay the annual membership dues.

The significant distinctions between unions and state bars make this Court's statement that the issues pose "constitutional questions of the utmost gravity," even more true in this case than they were in *International Association of Machinists v. Street*, 367 U.S. 740, 749 (1961). A state bar is more than merely a collective bargaining agent between workers and a particular employer; it is the gateway to the practice of law for all lawyers who want to practice their profession anywhere in the state. As the gatekeeper for the practice of law, the state bar holds the keys to lawyers' livelihood, not merely to the door to a particular employer. Consequently, the mandatory bars' obligation to protect the First Amendment rights of their members is even greater than the duties imposed upon unions by *Street*, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 236 (1977); *Ellis v. Railway*

Clerks, 466 U.S. 435, 447 (1984) and *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 310 (1986).

Instead of affording this protection to members of the Florida Bar, the Florida Supreme Court diminished members' constitutional rights to the point that the Bar is an adversary instead of an advocate. The Bar established and the Court sanctioned a sleight of hand in which political and ideological activities unrelated to regulation of the legal profession or improving the quality of legal services and with the potential of causing divisiveness among bar members are carried out by sections created and controlled by the Bar. Emphasizing the voluntary membership and dues to the section and overlooking the financial support provided by the Bar, the Florida court pronounced that Bar sections are not bound by this Court's precedents, including *Keller v. State Bar of California*, 496 U.S. 1 (1990), which specifically addressed activities by similar organizations in California.

I. THE FLORIDA SUPREME COURT'S DECISION THAT THE FIRST AMENDMENT RIGHTS ESTABLISHED IN *KELLER* DO NOT APPLY TO SECTIONS CREATED AND CONTROLLED BY MANDATORY BARS CONFLICTS WITH THIS COURT'S PRECEDENTS.

According to the Florida Supreme Court, mandatory state bars can and should evade this Court's ruling against engaging in ideological and political activities unrelated to regulating the legal profession and improving legal services by creating sections and permitting them to engage in those activities. The Court boldly proclaimed that sections created

and controlled by the mandatory bar are not bound by this Court's determination that the First Amendment prohibits the Bar from compelling members to support ideological activities unrelated to regulating the legal profession and improving legal services. *See Keller v. State Bar of California*, 496 U.S. 1, 13 (1990) (App., 11a). The Florida court used the fact that membership in and dues for bar sections are voluntary to justify its conclusion that sections do not need to follow *Keller*. (App., 11a-12a). The Court's ruling reflects a presumption that it is permissible and admirable for the Bar to engage in political and ideological advocacy, but that because of *Keller* the Bar has to devise other ways to engage in those activities, such as creating closely-controlled and partially financed sections and approving their advocacy. (App., 13a). The result is a substantial conflict with *Keller* and the significant First Amendment jurisprudence upon which it is based.

In *Keller*, this Court built upon years of precedent upholding the First Amendment rights of union members against compelled support of union political and ideological activities with which the members disagree. This Court has long upheld "agency shop" and "union shop" agreements which require that workers financially support unions' collective bargaining efforts even if they object to belonging to a union, because all employees benefit from collective bargaining. *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956), *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961). However, this Court has also made it clear that unions cannot compel dissenting employees to support ideological activities that are not related to the unions' duties as collective bargaining agents. Instead the unions must finance those activities solely from the dues of employees

who do not object to advancing those ideas. *Street*, 367 U.S. at 768; *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 236 (1977); *Ellis v. Railway Clerks*, 466 U.S. 435, 447 (1984); *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 310 (1986). In each of those cases, non-payment of the agency shop fees might have cost the employees a particular position, but would not, as would non-payment of Bar dues here, cost them their livelihood.

While requiring employees to support a union as a collective-bargaining agent might be seen as interfering in some way with an employee's freedom of association, this Court determined in *Hanson* and *Street* that any such interference is constitutionally justified by the interest in fostering peaceful labor relations. *Abood*, 431 U.S. at 222. However, the constitutional justification extends only to activities related to collective bargaining, contract administration and grievance adjustment. *Id.* at 225-226. Compelling an employee to support political and ideological causes unrelated to those functions runs afoul of Thomas Jefferson's warning that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." *Id.* at 234-235 n.31. Therefore, unions cannot require that dissenting employees support an ideological cause to which they are opposed as a condition of public employment. *Id.* at 235.

This Court applied the principles announced in *Abood* to private sector employees and further defined what activities are properly chargeable to dissenting employees in *Ellis*, 466 U.S. at 448.

[W]hen employees such as petitioners object

> to being burdened with particular union expenditures, the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representatuve of the employees in dealing with the employer on labor-management issues.

Id. Under that standard, objecting employees can be compelled to pay the expenses of activities or undertakings "normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit." *Id.* The *Ellis* court found that it was permissible to charge objecting employees for the costs of the union's convention, social activities and relevant portions of publications, but not for litigation unrelated to labor agreements or for general organizing efforts. *Id.* at 455-457.

In *Keller*, this Court applied these long-standing protections from compelled support of non-germane ideological activities to lawyers who must join and pay dues to mandatory state bars in order to practice their profession. *Keller*, 496 U.S. at 12-13. This Court found that the substantial analogy between the relationship of the Bar and its members and the relationship of employee unions and their members justified subjecting mandatory bars to the same constitutional rules with respect to the use of compulsory dues to which labor unions are subjected. *Id.* at 13. Consequently, state bars may constitutionally fund activities that are germane to the goals of regulating the legal profession and improving the quality of legal services out of the mandatory

dues of members. *Id.* at 14. However, they may not use mandatory dues to fund activities of an ideological nature which fall outside of those areas. *Id.* Notably, some of the activities that the *Keller* court found to be impermissible uses of mandatory dues included advocacy by the State Bar of California's Conference of Delegates, which was funded and sponsored by the State Bar, endorsing gun control and a nuclear weapons freeze. *Id.* at 15. The Conference of Delegates consisted of representatives of voluntary bar associations and bar sections who met annually to consider legislative proposals. *Keller v. State Bar of California*, 47 Cal.3d 1152, 1161 (1989), *cert. granted, judgment reversed, Keller v. State Bar,* 496 U.S. 1 (1990). The Conference was created and controlled by the State Bar of California, and its activities were judged equally with the Board of Governors' activities. *Keller*, 496 U.S. at 16. This Court noted that it will not always be easy to discern where the line between permissible and impermissible activities should be drawn, but that the conference's advocacy on gun control and nuclear weapons clearly fell on the impermissible side of the line. *Id.* Since *Keller* the Conference has separated from the State Bar and incorporated as an independent , self-funded organization so that it can engage in political and ideological advocacy. (Appendices F, G and H, App. 86a-93a). Conference members cited *Keller* as the reason behind the separation since the conference's continued support of political and ideological causes was creating problems for the State Bar. (App., 86a-90a). There is no similar separation between The Florida Bar and its sections.

In contravention of this Court's consistent and extensive history of protection from compelled association and support of political and ideological advocacy, the Florida

Supreme Court concluded that "*de minimis*" compulsion and indirect association are acceptable, even desirable, to lessen the effects that *Keller* has had on Bar advocacy. Instead of analyzing the Bar's actions from the standpoint of their effect on the First Amendment principles this Court established in *Keller*, the Florida Supreme Court simply proclaimed that *Keller* does not apply. Underlying the Florida court's conclusion is an assumption that it is appropriate and desirable for the Bar to engage in political and ideological advocacy, but that, because of *Keller*, the Bar needs to find other avenues for these admirable pursuits. The Court cited portions of the opinion in *The Florida Bar re Frankel*, 581 So. 2d 1294 (Fla. 1991) as authority for its conclusion that sections created and controlled by the Bar are not bound by *Keller*. (App., 12a). In particular, the Court cited the following language from *Frankel*:

> The bar has many volunteer sections and political action committees through which bar members may assert their views. See In re Amendment to Integration Rule; Schwarz, (McDonald, J. dissenting). Indeed, these volunteer sections and committees are the appropriate vehicles for lobbying on issues that do not fall within the Schwarz guidelines. *Frankel*, 581 So.2d at 1299 (emphasis supplied).

(App., 13a). The Court also placed particular emphasis on a concurring opinion which expressed regret that because of *Keller* the Bar could not engage in the advocacy challenged by bar member Frankel. (App., 13a). "As Justice Barkett stated in her specially concurring opinion in Frankel:

> I am compelled to agree that The Florida Bar's lobbying efforts in this instance will not fit within the criteria of The Florida Bar re Schwarz, 552 So.2d 1094 (Fla.1989), cert. denied 498 U.S. 951, 111 S.Ct. 371, 112 L.Ed.2d 333 (1990), though I confess, like Cinderella's sisters, I have tried mightily to force the foot into the glass slipper. I am hopeful that the voluntary bar associations and the various sections of the Bar will take up the slack.

Frankel, 581 So.2d at 1300 (Barkett, J., specially concurring) (emphasis supplied)." (App.,13a). Justice Barkett's confession about trying to fit the advocacy activities into the "glass slipper" of permissible Bar activities reflects a perspective that the advocacy activities are desirable but have been stymied by this Court's decision in *Keller* and the Florida court's application of *Keller* in *Schwarz*. Justice Barkett brought the point home with her comment that she hoped that sections could "take up the slack," which meant, again, that she believed that political advocacy was being unduly restricted. By embracing and emphasizing these statements to reach its conclusion that *Keller* does not apply to sections, the Court signaled its agreement that *Keller* represents an unfortunate restriction upon Bar advocacy. The Court parlayed that belief into a new legal standard, *i.e.*, that "voluntary sections are not bound by the *Keller* and *Schwarz* requirements." (App., 12a). "Accordingly, we conclude that the decision by the Bar to authorize the Family Law Section to file an amicus brief does not violate the First Amendment rights of the petitioners, who disagree with the legal position taken." (App., 13a). Inherent in that conclusion is the Florida

court's determination to somehow sanction political advocacy in order to lessen the burden this Court placed on the Bar in *Keller*.

Conspicuously absent from the Court's decision is substantive analysis of the effects the Bar's actions will have on the rights that *Keller* and its predecessors sought to protect, *i.e.*, the right of those who are compelled to join a union or state bar to be free from compelled advocacy for political and ideological issues with which they disagree. These rights, which were at the heart of *Keller* and the earlier union rulings, garnered only a cursory review from the Florida court. The Court acknowledged that sections are created and supervised by the Bar and integral to its functioning, but concluded that their activities do not affect members' First Amendment rights under *Keller* because the Florida court's post-*Keller* decisions have addressed only activities of the Bar, not the sections. (App., 12a). The Florida court failed to acknowledge that *Keller* itself involved activities by an organization similar to sections – the Conference of Delegates of the State Bar of California – which this Court analyzed under the same standards as it did the activities of the State Bar. *Keller*, 496 U.S. at 16.

Rather than analyzing whether mandatory dues are used to support the sections, which would specifically implicate *Keller*, the Court simply accepted the Bar's representation that it receives reimbursement from the sections sufficient "to cover any services related to activities that would be beyond the bounds of permissible Bar activity." (App., 11a n.11). The Bar did not provide any empirical evidence to support the representation. Nevertheless, the Court found Standing Board Policy 5.63(a)'s provision for an

annual administrative support charge of $17.50 per section member sufficient to support the Bar's argument and to conclude that mandatory dues used to support the sections would be "*de minimis*." (App., 11a n.11, 44a). However, the Court overlooked Section 5.63(c), which provides that the Bar will provide support of up to $10.00 per section member when section administrative costs exceed $17.50 per section member. (App., 45a). That provision shows that members' mandatory dues might be used to support the section and its ideological activities, in violation of *Keller,* if the sections's administrative costs exceed $17.50 per section member. Protection of the rights this Court established in *Keller* required further analysis of the revenues and expenses of the section to ensure that members were not indirectly subsidizing prohibited ideological activities. The Florida court failed to undertake that analysis. Instead, it jumped to the conclusion that mandatory dues used were "*de minimis*" so the sections are immune from *Keller* and can engage in political and ideological advocacy that their parent organization, the Bar, cannot. (App., 11a).

The Florida Supreme Court's conclusion that sections created and controlled by the mandatory bar are not bound by *Keller* conflicts with the principles this Court established in *Keller* and in the union cases upon which *Keller* was based. This Court should accept review to close the gaping loophole opened by the Florida court.

II. THE FLORIDA SUPREME COURT'S RULING THAT THE FLORIDA BAR DID NOT VIOLATE PETITIONERS' FIRST AMENDMENT RIGHTS WHEN IT REFUSED TO MAKE AN ACCOUNTING OF THE EXPENDITURES ASSOCIATED WITH THE SECTION'S IDEOLOGICAL ACTIVITY BECAUSE ANY SUCH EXPENDITURES WERE "DE MINIMIS" CONTRADICTS THIS COURT'S PRECEDENTS.

The Florida Supreme Court acted contrary to its obligation to protect dissenting members' First Amendment rights this Court established in *Abood, Ellis, Hudson* and *Keller* when it upheld the Bar's erroneous conclusion that only voluntary section dues or "*de minimis*" mandatory dues would be used for the amicus brief so there was no need to undertake the constitutionally mandated accounting for ideological activities.

In *Abood,* this Court identified the need for procedures to ensure that dissenting employees' constitutional rights are protected. *Abood v. Detroit Bd.of Educ.*, 431 U.S. 209, 237 (1977). "The objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Id. Ellis* expanded upon *Abood* and held that a pure rebate approach to dissenters' objections was constitutionally inadequate. *Ellis v. Railway Clerks*, 466 U.S. 435, 443 (1984)."By exacting and using full dues, then refunding months later the portion that it was not allowed to exact in the first place, the union effectively charges the

employees for activities that are outside the scope of statutory authorization." *Id.* at 444. Even if interest is paid on the money, it is still an involuntary loan for purposes to which the employee objects. *Id.* "The union cannot be allowed to commit dissenters' funds to improper use even temporarily." *Id.*

Hudson spelled out the procedural prerequisites that the union must put in place to ensure that nonunion employees' contributions are not used for impermissible purposes. *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 309 (1986). Those requirements include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision-maker, and an escrow for the amounts reasonably in dispute while such challenges are pending. *Id.* at 310.

Keller affirmed that these procedures are equally applicable to mandatory bars. *Keller v. State Bar*, 496 U.S. 1, 14 (1990). "Thus, the guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of the legal service available to the people of the State." *Id.* This Court remanded the issue of whether the State Bar of California had procedures in place that would satisfy *Hudson*, but affirmed that *Hudson* was the appropriate standard. *Id.* at 17.

The Florida Bar has developed procedures that the Eleventh Circuit and Florida Supreme Court have said comply with *Hudson*. *Gibson v. The Florida Bar*, 906 F.2d 624, 632 (11th Cir. 1990), *cert. granted*, 499 U.S. 918 (1991),

cert. denied as improvidently granted, 504 U.S. 104 (1991); *The Florida Bar re Frankel*, 581 So.2d 1294,1299 (Fla. 1991). The Bar has also represented to this Court that its decisions in *Abood* and *Keller* require that the Bar comply with those procedures as to all types of legislative and ideological activities. During the *Gibson* oral argument, the Bar's counsel told the Court: "it is clear from this Court's decisions that the *Abood* criteria, the requirements of *Hudson*, are not limited to legislative lobbying positions, and as far as the Florida bar is concerned, it reads its own Supreme Court decision [in *Frankel*] as being as expansive as are the decisions [sic] of this Court in *Keller*." (Transcript of oral argument, November 16, 1991, *Gibson v. Florida Bar*, Case No. 90-1102, 1991 WL 636287 at *27.) The Florida Bar's counsel was responding to an earlier exchange between opposing counsel and Justice Kennedy regarding the potential that the Florida Supreme Court would seek to limit the application of the objection procedure to certain legislative activities. 1991 WL 636287 at *4. In particular, when Mr. Gibson's counsel argued that the Florida court decision in *Frankel* was limited to certain legislative activities, Justice Kennedy said that such a position would "achieve nothing – to say, you have to be partially constitutional." 1991 WL 636287 at *4-*5. In response to that statement by Justice Kennedy, the Bar's counsel made the statement that from the Bar's standpoint the *Frankel* decision is as expansive as *Keller*. 1991 WL 636287 at *27. "It is our opinion that it would make no sense, as Justice Kennedy suggested, for the Florida Supreme Court to attempt to distinguish between the two and so, as we understand that ruling, we are limited as to all political and ideological purposes to the parameters of *Keller* and *Abood*." 1991 WL 636287 at *27.

However, the Bar's response to Petitioners' objection and the Florida court's affirmation of that response indicate that the Bar and court are adopting just the kind of "partially constitutional" position that Justice Kennedy alluded to in the *Gibson* argument. The Bar did not comply with the objection procedures upheld in *Gibson* and *Frankel* when Petitioners objected in writing to the Bar's approval of the Section's amicus brief. The Florida Supreme Court did not merely overlook the non-compliance, but concluded that compliance was not even necessary because *Keller* did not apply to sections and any mandatory dues would be "*de minimis*." (App., 11a, n.11). The Court constructed a faulty syllogism upon false premises about the relationship between the Bar and its sections. Reduced to its essentials, the Florida Supreme Court's conclusion that *Keller* does not apply to bar sections can be summed up as follows: (1) Membership and the payment of dues to The Florida Bar's sections are voluntary; (2) The dues paid by bar members who voluntarily join the sections pay for most of the expenses associated with operating the sections; (3) Therefore, mandatory dues used to pay for section activities are "*de minimis*"and *Keller* does not apply.

The Bar did not provide the Court with any evidence regarding the amount of funding provided by voluntary dues, subsidies from mandatory dues or any other funding sources. (App., 11a n.11). Instead, the Bar merely stated that it provides some administrative services to the sections for which the sections allegedly compensate the Bar. (App., 11a n.11). The Bar claimed that the fees paid by the sections are "sufficient to cover any services related to activities that would be beyond the bounds of permissible bar activity." (App., 11a n.11). The Court accepted that proposition based

upon Standing Board Policy 5.63(a)'s provision for a $17.50 per section member charge for administrative support services, with no further evaluation. (App., 11a n.11). The Florida court overlooked Standing Board Policy 5.63(c), which provides that when a section's administrative support costs exceed the $17.50 per section member charge, then the Bar "will provide support up to an amount calculated at $10.00 per section member for the first 1,000 members." (App., 44a). Consequently, contrary to the Bar and court's assertions, the $17.50 per section member paid by the sections is not necessarily sufficient to cover all of the services related to the section activities. Absent proof that the Bar did not provide an administrative support subsidy to the Section, there is no basis for the Court's conclusion that no mandatory dues were used for the Section's ideological activities. In fact, by admitting that the mandatory dues used were "*de minimis*," the court acknowledged that mandatory dues were used. Furthermore, merely stating that the Bar charges for administrative support costs only addresses part of the question regarding whether any mandatory dues are used for section activities. There is no evidence in the record regarding other section costs and the source of funding for those expenses. Consequently, there is no support for the Court's conclusion that "any such advocacy by a section is not funded with compulsory dues." (App., 11a). That being the case, the Court's conclusion that sections are not bound by *Keller* is without merit. Moreover, there is no "*de minimis*" exception to the First Amendment protections.

Under *Keller* and its foundational precedents, the Bar is required to demonstrate that it is not using mandatory dues for such activities. The Bar failed to demonstrate that no mandatory dues were used to pay for the amicus brief. *See*

Abood, 431 U.S. at 239-240, n.40 (union has the burden of proof regarding the amount of members' dues being used for advocacy). Not only did the Florida court accept the Bar's word without proof and conclude that the Bar did not have to comply with its own procedures, but it also relegated the entire discussion to a footnote. (App., 11a n.11).

The Florida Supreme Court has not merely disagreed with this Court's *Keller* decision, but has condoned the Florida Bar's circumvention of the First Amendment principles for which *Keller* stands. The Florida court has fulfilled its less than subtle desire to effectively overrule *Keller* and permit the Bar to engage in what the court views as desirable political and ideological advocacy subsidized by Florida's lawyers and judges. This Court should grant review to resolve these significant constitutional issues raised by the Florida court's action.

III. THE FLORIDA SUPREME COURT'S CONCLUSION THAT A "*DE MINIMIS*" EXPENDITURE OF MANDATORY BAR DUES FOR A SECTION'S POLITICAL AND IDEOLOGICAL ACTIVITIES DOES NOT IMPLICATE THE FIRST AMENDMENT CONFLICTS WITH THIS COURT'S LONG-ESTABLISHED PRECEDENTS.

The Florida Supreme Court summarily concluded (in a footnote) that if there were any expenditure of mandatory Bar dues for the Family Law Section's amicus brief it would be "*de minimis*" and would not implicate the First Amendment concerns addressed in *Keller v. State Bar*, 496 U.S. 1, 13 (1990). (App., 11a n.11). As explained more fully

above, the Bar did not provide the constitutionally required accounting of the funds that were to be used for the amicus brief. In particular, the Bar did not explain whether the $10.00 per section member administrative subsidy had been provided to the Family Law Section, or whether any other subsidies had been provided that would be attributable to the amicus brief. Consequently, the Court had no basis for concluding that any mandatory dues used for the activity would be "*de minimis*." Furthermore, the underlying premise that a "*de minimis*" expense would not implicate the First Amendment concerns raised in *Keller* is false.

Using compulsory dues to fund political activities with which the dues payer disagrees raises constitutional concerns "of the utmost gravity." *International Ass'n of Machinists v. Street*, 367 U.S. 740, 749 (1961). As this Court said in *Abood*, "[o]ur decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 233 (1977). "Equally clear is the proposition that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment." *Id.* at 234. This leads to the conclusion that union members, and by analogy under *Keller*, mandatory bar members, can prevent the union/mandatory bar from spending part of their mandatory dues to contribute to political candidates and to express political views unrelated to the bar's purposes. *See id.*

These sentiments reach back to the nation's founding. "At the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a

free society one's beliefs should be shaped by conscience," not coercion. *Id.* at 235. This is not an incidental aspect of the First Amendment, but a core tenet as elucidated by the Founding Fathers:

> James Madison, the First Amendment's author, wrote in defense of religious liberty: "Who does not see ... [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" 2 The Writings of James Madison 186 (G. Hunt ed. 1901). Thomas Jefferson agreed that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." I. Brant, James Madison: The Nationalist 354 (1948).

Abood, 431 U.S., at 234-235, n. 31. Notably Jefferson did not qualify his statement by saying that a "*de minimis*" contribution would be acceptable. Nor has this Court. In *Abood* this Court did not qualify its statement that the constitution prohibited the union from "requiring any of the appellants to contribute to the support of an ideological cause he may oppose as a condition of holding a job as a public school teacher." *Id.* at 235. This Court emphasized that "such expenditures" [not "non-*de minimis*" expenditures] can only be financed from funds paid by employees who do not object to advancing those ideas and who are not coerced into doing so. *Id.* at 236. As this Court later confirmed, under *Abood* a union cannot, consistently with the Constitution, "collect

from dissenting employees any sums for the support of ideological causes not germane to its duties as collective-bargaining agent." *Ellis v. Railway Clerks,*, 466 U.S. 435, 447 (1984). After *Keller*, these statements apply equally to a mandatory bar, *i.e.*, it cannot collect any sums for the support of ideological causes not germane to its duties to regulate the legal profession and improve the quality of legal services. *Keller*, 496 U.S. at 13-14. Notably, in *Ellis*, this Court said that the union cannot collect **any** sums, not that it could collect "*de minimis*" sums.

In *Hudson*, this Court clarified that the amount at stake for each individual dissenter does not diminish the concern that their funds might be used, even temporarily, to finance ideological activities. *Chicago Teachers Union, et al. v. Hudson*, 475 U.S. 292, 305 (1986). "For, whatever the amount, the quality of respondents' interest in not being compelled to subsidize the propagation of political or ideological views that they oppose is clear." *Id.* at 306.

In the same way, regardless of the amount of mandatory dues that might have been used, Petitioners' interests in not being compelled to subsidize the propagation of the political and ideological views expressed in the amicus brief are clear. In fact, in this case it is even more critical since, unlike unions, the Bar requires both membership and payment of dues and the Bar holds the key to a lawyer's livelihood. The Bar is prohibited from requiring Petitioners to contribute to the support of the ideological views expressed in the amicus brief. Its failure to demonstrate that no mandatory dues were used implicates Petitioners' First Amendment rights. The Florida Supreme Court's conclusion that only dues that are more than "*de minimis*" implicate the

First Amendment contradicts this Court's precedents. This Court should grant the Petition to resolve the conflict.

CONCLUSION

Rather than following *Keller* and fulfilling its obligation to protect and preserve the First Amendment rights of Petitioners and other members of the Florida Bar, the Florida Supreme Court has flouted the *Keller* decision and condoned the Bar's circumvention of *Keller*'s core principles. This Court has consistently rejected similar efforts to abuse the power to compel association in and payment of dues to unions and mandatory bars by compelling support of political and ideological advocacy. The Florida Bar's actions and Florida Supreme Court's affirmation of those actions should be similarly rejected.

For these reasons, Petitioners respectfully request that this Court grant their Petition for a Writ of Certiorari.

September 2, 2009.

Mathew D. Staver
(counsel of record)
LIBERTY COUNSEL
PO Box 540774
Orlando, FL 32854-0774
(800) 671-1776 Telephone
(407) 875-0770 Facsimile
Attorney for Petitioners

Stephen M. Crampton
Mary E. McAlister
LIBERTY COUNSEL
PO Box 11108
Lynchburg, VA 24506
(434) 592-7000 Telephone
(434) 592-7700 Facsimile
Attorneys for Petitioners

APPENDIX

APPENDIX A

Supreme Court of Florida

No. SC09-363

LIBERTY COUNSEL, et al.,
Petitioners,
v.

THE FLORIDA BAR BOARD OF GOVERNORS, et al.,
Respondents.

[June 4, 2009]

PARIENTE, J.

The narrow issue before us is whether the Court in the exercise of its supervisory authority over The Florida Bar under article V, section 15, of the Florida Constitution,[1] should enjoin The Florida Bar from permitting a voluntary section of the Bar to file an amicus brief in pending litigation

---

[1] Article V, section 15, provides that "[t]he supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted."

in a district court of appeal.[2] Specifically, the petitioners, Liberty Counsel, a nonprofit public interest law firm based in Maitland, Florida, and two members of The Florida Bar,[3] seek to enjoin The Florida Bar from permitting the Family Law Section to file an amicus brief in the Third District Court of Appeal in support of a trial court ruling that held unconstitutional a law that prohibits homosexuals from adopting children.[4]

The Family Law Section is a voluntary section of the Bar established pursuant to the authority vested in the Bar by

---

[2] Although the parties refer to the actions of the Bar as granting permission to the voluntary section to file an amicus brief, as explained more fully herein, the decision whether to allow the filing of the amicus brief is one within the discretion of the appellate court hearing the appeal-in this case the Third District Court of Appeal. *See* Fla. R.App. P. 9.370.

[3] These members are Anita Staver, President of Liberty Counsel and a member in good standing of The Florida Bar, and Scott Dixon, an affiliate attorney with Liberty Counsel and a member in good standing of The Florida Bar. Petitioners are collectively referred to as "Liberty Counsel."

[4] The petition specifically seeks permanent or temporary injunctive relief or other extraordinary relief against respondents, The Florida Bar Board of Governors, the President of The Florida Bar, John White, III, and the Executive Director of The Florida Bar, John Harkness, Jr. (collectively referred to as "the Bar").

Rule 1-4.5 of the Rules Regulating The Florida Bar.[5] After a vote by its Executive Council, the Family Law Section sought approval from the Board of Governors of the Bar to file the amicus brief. The Board of Governors held a meeting at which it unanimously voted to permit the filing of the amicus brief.

The petitioners make three arguments in support of their claim: (1) the Bar violated their First Amendment rights by allowing the Family Law Section to file an amicus brief; (2) the Bar's approval of the filing of the amicus brief constituted an ultra vires act in violation of the Bar's own policies; and (3) the Bar's approval of the filing of the amicus brief places judges who are members of the Family Law Section in the position of violating the canons of judicial ethics.

We conclude that the Bar's actions in permitting the Family Law Section to file an amicus brief do not violate the First Amendment rights of the petitioners because membership in the Family Law Section is voluntary and any such advocacy by a section is not funded with compulsory

---

[5] Rule 1-4.5, titled "Sections," provides:

> The board of governors may create and abolish sections as it may consider necessary or desirable to accomplish the purposes and serve the interests of The Florida Bar and of the sections and shall prescribe the powers and duties of such sections. The bylaws of any section shall be subject to approval of the board of governors.

dues. We further conclude that the actions of the Bar do not constitute an ultra vires act requiring this Court, in the exercise of its supervisory authority over the Bar, to grant an injunction.[6] Accordingly, because we conclude that Liberty Counsel has not met the requirement for injunctive relief that there be a violation of a "clear legal right" to relief, we deny the petition.[7]

---

[6] We reject, without detailed discussion, petitioners' claim that the filing of an amicus brief by the Family Law Section will cause judges who are members of the section to be in violation of the Code of Judicial Conduct because the filing of the brief will express a political or ideological view. Even assuming the filing of a legal brief discussing the relevant case law on a legal issue is analogous to a political or ideological position, a view with which we do not agree, nothing in this Court's case law or in the Code of Judicial Conduct prohibits judges from belonging to associations because the associations endorse a particular political or ideological position as a result of a decision in which the judge took no part. If that were the case, judges would be prohibited from being members of a variety of voluntary professional associations, including the American Bar Association and the National Bar Association, and from participating in the valuable nonpolitical activities of bar sections.

[7] To obtain a temporary injunction, the petitioner must satisfy a four-part test under Florida law: "a substantial likelihood of success on the merits; lack of an adequate remedy at law; irreparable harm absent the entry of an injunction; and that injunctive relief will serve the public interest." Reform Party of Fla. v. Black, 885 So.2d 303, 305

At the outset, we explain that this case does not concern the merits of the underlying case, that is, whether section 63.042(3), Florida Statutes (2008), is constitutional. The merits of that controversy are pending in the Third District. This case is also not about whether this Court should grant permission for the Family Law Section to file an amicus brief. Liberty Counsel itself has announced that it is seeking to file an amicus brief in support of the ban against adoptions by homosexuals, and of course nothing prevents other voluntary associations from seeking to file amicus briefs. Pursuant to the applicable Rule of Appellate Procedure, 9.370, an amicus brief may be filed only with "leave of court." [8] In this case, because the case is pending in the Third District, the decision as to whether to grant leave of court to file an amicus brief will be made by that court.[9]

(Fla.2004) (citing Dania Jai Alai Int'l, Inc. v. Murua, 375 So.2d 57, 58 (Fla. 4th DCA 1979)). To obtain a permanent injunction, the petitioner must "establish a clear legal right, an inadequate remedy at law and that irreparable harm will arise absent injunctive relief." K.W. Brown & Co. v. McCutchen, 819 So.2d 977, 979 (Fla. 4th DCA 2002) (citing Murua, 375 So.2d at 58).

[8] Pursuant to rule 9.370(a), a "motion for leave to file must state the movant's interest, the particular issue to be addressed" and "how the movant can assist the court in the disposition of the case." Fla. R.App. P. 9.370(a) (emphasis added).

[9] In an article titled Amicus Briefs: Friend or Foe of Florida Courts?, Sylvia H. Walbolt and Joseph H. Lang, Jr., explained: "Amicus briefs are supposed to assist the court in

The narrow issue we are asked to decide in this case is one of first impression for this Court because we have never been asked to rule on the authority of voluntary sections of the Bar to seek to file amicus briefs in pending cases, whether there should be limits on that authority, and, if so, whether this Court should act to constrain that authority. In order to answer this issue, we first address Liberty Counsel's First Amendment argument and then address its ultra vires argument.

ANALYSIS

First Amendment

As to Liberty Counsel's claim that the Bar's actions violated its First Amendment rights, we begin with the seminal case of Keller v. State Bar of California, 496 U.S. 1, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990). In Keller, the United States Supreme Court held that the First Amendment prohibits a state bar in which membership is a mandatory requirement for the practice of law to use its compulsory dues to fund activities that are not germane to the regulation of the legal profession and the quality of legal services for the

---

resolving cases of general public interest or aid in resolving difficult issues that have an impact beyond the parties to the litigation. They 'should not be used to simply give one side more exposure than the rules contemplate.' " Sylvia H. Walbolt & Joseph H. Lang, Jr., Amicus Briefs: Friend or Foe of Florida Courts?, 32 Stetson L.Rev. 269, 296-97 (2003) (footnote omitted) (quoting Ciba-Geigy Ltd. v. Fish Peddler, Inc., 683 So.2d 522, 523 (Fla. 4th DCA 1996)).

people of the State. As to the scope of permissible dues-financed activities in which the State Bar could engage, the Supreme Court concluded:

> [T]he guiding standard must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or "improving the quality of the legal service available to the people of the State."
>
> ....
>
> Precisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisers to those ultimately charged with the regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy to discern. But the extreme ends of the spectrum are clear: Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the Bar or proposing ethical codes for the profession.

Id. at 14-16.

Following Keller, this Court established standards for expenditures by The Florida Bar on ideological or political activity as well as approved limitations on permissible areas for lobbying by the Bar. In Florida Bar re Schwarz, 552 So.2d 1094 (Fla.1989), the Court adopted the Judicial Council of Florida's recommendation that the following areas clearly justify bar lobbying activities:

> (1) Questions concerning the regulation and discipline of attorneys;
>
> (2) matters relating to the improvement of the functioning of the courts, judicial efficacy and efficiency;
>
> (3) increasing the availability of legal services to society;
>
> (4) regulation of attorneys' client trust accounts; and
>
> (5) the education, ethics, competence, integrity and regulation as a body, of the legal profession.

Id. at 1095 (quoting Judicial Council of Florida, Special Report to the Supreme Court of Florida on Legislative Activities of The Florida Bar 9 (1988)). The Court also adopted the Council's recommendation that the following additional criteria be used to determine permissible bar lobbying activities when the legislation falls outside of the above specifically identified areas:

> (1) That the issue be recognized as being of great public interest;
>
> (2) that lawyers are especially suited by their training and experience to evaluate and explain the issue; and
>
> (3) the subject matter affects the rights of those likely to come into contact with the judicial system.

Id. (quoting Judicial Council of Florida, supra, at 9-10). The Court went on to state: "[W]e also suggest that the Board exercise caution in the selection of subjects upon which to take a legislative position so as to avoid, to the extent possible, those issues which carry the potential of deep philosophical or emotional division among the membership of the Bar." Id. at 1097.However, the Court did not incorporate that cautionary note into the guidelines we adopted.

Following Schwarz, this Court has entertained challenges to the scope of the Bar's activities in the exercise of its supervisory authority over the Bar itself as opposed to voluntary sections. Specifically, in Florida Bar re Frankel, 581 So.2d 1294 (Fla.1991), the Court considered a challenge to the Board of Governors' adoption of the lobbying positions of the Bar's Commission for Children.[10] In that case, the Bar

---

[10] The lobbying positions concerned the following: expansion of the program for women, infants, and children; extension of Medicaid coverage for pregnant women; full immunization for children; establishing children's services

claimed that its involvement in children's matters clearly justified advocacy of the contested positions due to their relationship to the ethics and integrity of the legal profession. Id. at 1296.The Bar also stated that its moral obligation to Florida's children verified the suitability by training and experience within the legal profession to evaluate and explain the contested lobbying positions. Id. at 1298.This Court noted that the Bar carries the burden of proof in establishing the propriety of its lobbying activities and rejected the Bar's position. Id. at 1296.The Court concluded that the Board of Governors' adoption of the lobbying positions of the Bar's Commission for Children was impermissible under Schwarz and Keller. Id. at 1298.In response to the Bar's argument that only nine of its members objected to the issues, this Court stated that the "merit of the position or the unanimity in its support is not the standard by which to determine the propriety of bar lobbying activities on that position." Id.

Because the Bar's lobbying positions did not fall within the Schwarz guidelines, they were deemed outside the scope of permissible lobbying activities. Id. By contrast, the Court has concluded that the Bar's lobbying activities in support of ballot measures related to judicial selection and retention did fall within the Schwarz guidelines. See Alper v. Fla. Bar, 771 So.2d 523, 526 (Fla.2000). Unlike the positions taken on child welfare and family health in Frankel, the Bar's positions on judicial selection and retention in Alper met the

---

councils; family life and sex education/teen pregnancy; increasing aid to families with dependent children; enhanced child-care funding and standards; and creation of a children's needs consensus estimating conference.

criterion of being related to the improvement of the functioning of the courts, judicial efficacy and efficiency, and the alternative criteria of dealing with an issue of great public interest, which lawyers are specially trained to evaluate and which can affect the rights of those likely to come into contact with the judicial system. Id. at 524.

Liberty Counsel's First Amendment argument under Keller focuses on the use of compulsory dues in approving the filing of and in the filing of the amicus brief by the Family Law Section. However, we conclude that the filing of the amicus brief by the Family Law Section does not implicate Liberty Counsel's First Amendment rights as defined in Keller because membership in and payment of dues to a section is voluntary and any such advocacy by a section is not funded with compulsory dues.[11]

---

[11] Liberty Counsel argues that the Bar "uses dues to pay for support staff for the sections."However, the Board of Governors maintains that "the Bar does provide some administrative services to the sections, for which the sections compensate the Bar in an amount sufficient to cover any services related to activities that would be beyond the bounds of permissible Bar activity."This assertion is supported by Standing Board Policy 5.63, titled "Administrative Support Policy," which shows that the sections are charged an administrative support cost per section member annually to reimburse the Bar for administrative expenses. The Family Law Section has informed the Bar that the brief at issue will be written by non-Bar counsel on a pro bono basis, so it would appear that any expenditure of Bar funds would be de minimis and not amount to the sort of dues-financed activity that raised the First Amendment concerns set forth in Keller.

Liberty Counsel also counters the Bar's argument that section membership and dues are voluntary by arguing that the sections are nevertheless creations of the Bar. We agree that under rule 1-4.5, sections are "an integral part of The Florida Bar" and have the duty to "work in cooperation with the board of governors and under its supervision toward accomplishment of the aims and purposes of The Florida Bar and of that section or division."R. Regulating Fla. Bar 2-7.2. Nevertheless, the standards and restrictions adopted by this Court subsequent to Keller address only the activities of the Bar and not the activities of the voluntary sections of the Bar.

In fact, this Court has previously concluded that voluntary sections are not bound by the Keller and Schwarz requirements. In Frankel, this Court discussed how Keller analogized a mandatory state bar association to a compulsory union in reaching its decision and explained:

> Within the context of a union-shop agreement, the Court previously has held that an injunction prohibiting a union from expending mandatory dues for political purposes would be inappropriate because nondissenting union members have an interest in stating their views "without being silenced by the dissenters." International Association of Machinists v. Street, 367 U.S. 740, 773, 81 S.Ct. 1784, 1802, 6 L.Ed.2d 1141 (1961); see Abood [v. Detroit Bd. of Educ., 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977)].

We find that the concern expressed in Street is inapplicable with regard to The Florida Bar. An injunction prohibiting the bar from lobbying on a particular issue would not silence the voices of nondissenting members. The bar has many volunteer sections and political action committees through which bar members may assert their views. See In re Amendment to Integration Rule; Schwarz, (McDonald, J. dissenting). Indeed, these volunteer sections and committees are the appropriate vehicles for lobbying on issues that do not fall within the Schwarz guidelines.

Frankel, 581 So.2d at 1299 (emphasis supplied). As Justice Barkett stated in her specially concurring opinion in Frankel:

> I am compelled to agree that The Florida Bar's lobbying efforts in this instance will not fit within the criteria of The Florida Bar re Schwarz, 552 So.2d 1094 (Fla.1989), cert. denied 498 U.S. 951, 111 S.Ct. 371, 112 L.Ed.2d 333 (1990), though I confess, like Cinderella's sisters, I have tried mightily to force the foot into the glass slipper. I am hopeful that the voluntary bar associations and the various sections of the Bar will take up the slack.

Frankel, 581 So.2d at 1300 (Barkett, J., specially concurring) (emphasis supplied).

Accordingly, we conclude that the decision by the Bar to authorize the Family Law Section to file an amicus brief does not violate the First Amendment rights of the petitioners, who disagree with the legal position taken.

Ultra Vires Action

Liberty Counsel further contends that the Bar committed an ultra vires act in approving the filing of the amicus brief because it violated its own standing board policies in doing so. It does not otherwise argue that the Bar lacks the authority to allow a voluntary section leave to file an amicus brief.

The Bar adopts standing board policies, which are not subject to this Court's approval, that govern its internal administration and operation. As explained in bylaw 2-9.2 of the Rules Regulating the Florida Bar:

> The board of governors shall adopt standing board policies governing the internal administration and operation of The Florida Bar and the board of governors. The board of governors may adopt, amend, or rescind standing board policies by a majority vote of the membership of the board of governors provided any amendment to any standing board policy shall not be effective until 30 days after adoption. Such standing board policies may be adopted, rescinded, or amended by a majority vote of those present at any regular meeting of the board of governors provided advance written notice is given to the members of the board of governors of the proposed adoption, repeal, or amendment of any standing board policy. The provision of any standing board policy may be waived by a two-thirds vote of those present at any regular meeting of the board of governors.

Standing Board Policy 8.10 governs amicus curiae filings by sections of the Bar. Sections 8.10(a)(1) and (a)(3) provide:

> (1) A section of The Florida Bar may adopt a position and submit an amicus curiae brief in pending litigation only when the issue is beyond the scope of permissible legislative or ideological activity of The Florida Bar, or the issue is within the permissible legislative or ideological activity of the bar and the proposed brief does not take a position that is inconsistent with an official position of the bar and the requirements of subdivision (3) are met.
> (3) Divisions, sections and committees may not adopt a position or submit an amicus curiae brief in pending litigation unless the issue involved is within the area of subject matter interest of the division, section or committee as described in its bylaws or official charge, and the issue is not one that carries the potential of deep philosophical or emotional division among a substantial segment of the membership of the bar.

Specifically, Liberty Counsel argues that the Bar violated section (a)(3). Liberty Counsel asserts that by determining that the issue of adoption by homosexuals is "not one that carries the potential of deep philosophical or emotional division among a substantial segment of the membership of the bar," the Bar violated section 8.10(a)(3) –

the violation of which constitutes an ultra vires act.[12]

In deciding that the actions of the Bar do not constitute an ultra vires act such that the Liberty Counsel has established a clear legal right, we make the following observations. First, we reiterate that our prior case law has imposed restrictions on the activities of the Bar, but none of our prior cases have involved restrictions on the activities of the voluntary sections of the Bar. Although we suggested in Schwarz,"that the Board exercise caution in the selection of subjects upon which to take a legislative position so as to avoid, to the extent possible, those issues which carry the potential of deep philosophical or emotional division among the membership of the Bar," 552 So.2d at 1097, we envisioned in Frankel that it would be the sections that would be "the appropriate vehicles for lobbying on issues that do not fall within the Schwarz guidelines." Frankel, 581 So.2d at 1299. In fact, Standing Board Policy 8.10(a)(1) recognizes this balance between the role of the Bar and the role of the sections regarding both the scope of lobbying positions and the subject of the amicus briefs. Specifically, section 8.10(a)(1) authorizes a section of the Bar to "submit an

---

[12] Liberty Counsel does not challenge the Bar's determination concerning the requirements of Standing Board Policy 8.10(a)(1) and (a)(3) that the issue be "beyond the scope of permissible legislative or ideological activity of the Florida Bar," that the brief "not take a position that is inconsistent with an official position of the bar," and that the area is "within the "subject matter interest" of the section. The requirements of Standing Board Policy 9.50(a), which applies to general political and legislative activity by sections, mirror those of Standing Board Policy 8.10(a).

amicus brief in pending litigation only when the issue is beyond the scope of permissible legislative or ideological activity of the Florida Bar." (emphasis added).

Second, as explained previously, the decision whether to allow an entity to file an amicus brief is ordinarily a decision made by the court in which permission is sought rather than a decision for this Court, in the exercise of our supervisory authority over the Bar. Third, we are presented with the Bar's standing policy related to amicus briefs, which is a standing policy that we have never approved or disapproved, which requires that the amicus brief not be submitted on an issue which "carries the potential of deep philosophical or emotional division among a substantial segment of the membership of the bar."[13]

With these three observations in mind, we consider the Bar's argument that we should deny injunctive relief in this case on the ground that the "Board of Governors, which is comprised of the elected representatives of the entire membership, is in the best position to determine whether a particular issue is highly divisive within the membership as a whole." We agree that the Board's decision regarding whether a voluntary section should be able to file an amicus brief is entitled to deference. We also conclude that the Court will not interfere with or micromanage the activities of the Bar's

---

[13] We do not address in this opinion the potential inconsistency between this internal limitation on the activities of voluntary sections through the Bar's standing policies and the recognition in both Schwarz and Frankel that the voluntary sections should take on issues, within the area of their expertise, which the Bar itself cannot address.

sections, or the approval of those activities by the Bar, unless the Bar's actions regarding the scope of the activities of its voluntary sections are clearly outside the Bar's authority.

Black's Law Dictionary defines an "ultra vires" act as one that is "unauthorized; beyond the scope of power allowed or granted by a corporate charter or by law." See Black's Law Dictionary 1559 (8th ed.2004). Although there is no case from this Court discussing the concept of "ultra vires" actions from the standpoint of the activities of the Bar or its sections, a 1940 case from this Court discussed the concept in terms of a corporation:

> Thompson on Corporations states that an act of a corporation is ultra vires "when it is outside the objects for which the corporation was created as defined by the laws of its organization and limited by the statutes authorizing its existence. In other words, it is an unauthorized act. In its primary sense, an act is 'ultra vires' the powers of a corporation when it is wholly outside of the scope of the purposes for which the corporation was formed or has its being, and which it has no authority to perform under any circumstances or in any mode."

Knowles v. Magic City Grocery, 144 Fla. 78, 197 So. 843, 844 (Fla.1940). Further, Florida courts have held that a municipality, county, or town engages in an "ultra vires" act when it lacks the authority to take the action under statute or its own governing laws. See, e.g., Lykes Bros., Inc. v. City of Plant City, 354 So.2d 878, 880 (Fla.1978) ("As to whether a

city's tax exoneration contract is valid, our decisions uniformly hold that municipal contracts promising not to impose taxes, or granting tax exemptions, are ultra vires and void in the absence of specific legislative authority."); Town of Lauderdale-by-the-Sea v. Meretsky, 773 So.2d 1245, 1249 (Fla. 4th DCA 2000) ("[T]he Town Commission authorized an act contrary to its own ordinances and, therefore, its approval was ultra vires and void.").

The Bar's approval of the filing of an amicus brief by the Family Law Section in the Third District was not an ultra vires act because in doing so, the Bar did not act contrary to any of its rules or policies, or rules promulgated by this Court. With regard to whether noncompliance with one of the Bar's own standing policies can constitute an ultra vires act requiring this Court to intervene by issuance of an injunction, we reject the argument that the approval of the filing of an amicus brief by a voluntary section is ultra vires.

Our support for this view is buttressed by the fact that the Bar can waive any of its standing policies by a vote of two-thirds of the Board of Governors. See R. Regulating Fla. Bar 2-9.2 ("The provision of any standing board policy may be waived by a two-thirds vote of those present at any regular meeting of the board of governors."). Implicit in the Board's unanimous vote to approve the filing of the amicus brief is the notion that the Board waived by a two-thirds vote the requirement that it determine the divisiveness of the issue.

Because the requirements of the standing board policies regarding the filing of amicus briefs by sections can be waived by the Board, the unanimous approval by the Board did not constitute an ultra vires action. And because there are

no other legal or constitutional prohibitions against the actions of the Family Law Section, we cannot conclude that the actions of the Bar were unauthorized. We thus decline to reach a decision whether, under these circumstances, the Board reached the correct or incorrect conclusion on the divisiveness of the subject matter of the amicus brief supporting the trial court's decision on the constitutionality of the legislative prohibition against adoption by homosexuals.

For all of the above reasons, we conclude that Liberty Counsel has not established a violation of a clear legal right and therefore deny Liberty Counsel's request for injunctive relief.

It is so ordered.

QUINCE, C.J., and LEWIS, LABARGA, and PERRY, JJ., concur.

POLSTON, J., dissents with an opinion, in which CANADY, J., concurs.

POLSTON, J., dissenting.

The Bar failed to comply with its policies, or waive them in the manner prescribed by its bylaws, when it approved the Family Law Section's request to file an amicus brief on homosexual adoption. Should The Florida Bar follow its own rules? The majority concludes that this decision is up to the Bar. See majority op. at 17. Because I agree with Liberty Counsel that this Court should require the Bar to comply with its own rules, I respectfully dissent .[14]

I. Failure to Properly Approve Amicus Brief on Divisive Issue

The Florida Bar's Standing Board Policy 8.10(a)(3) provides that sections of the Bar may not submit an amicus brief in pending litigation if the issue involved "carries the potential of deep philosophical or emotional division among a substantial segment of the membership of the bar."The issue of homosexual adoption is undeniably divisive. The Florida Bar does not argue otherwise. The majority opinion does not hold otherwise.

The Bar has consistently recognized the divisive nature of homosexual adoption in the past. In 2004, the Bar rejected the Family Law Section's request to lobby for the

---

[14] I agree with the majority that Liberty Counsel has not met the requirements for injunctive relief regarding its First Amendment and Code of Judicial Conduct claims.

repeal of Florida's law specifically because it determined that the issue of homosexual adoption had the potential of creating a deep philosophical and emotional divide among members of the Florida Bar. See Alan B. Bookman, Our Legislative Role, Fla. B.J., Feb. 2006, at 8. Then, in 2005, the Bar again recognized the divisiveness of the issue when it denied the Family Law Section's request to lobby that some homosexual parents be permitted to adopt. See Jan Pudlow, Family Law Section to File Gay Adoption Case Amicus, The Florida Bar News, Feb. 15, 2009.

In this case, based upon the meeting minutes from January 30, 2009, it is not at all clear that The Florida Bar made any determination regarding divisiveness or even that it recognized that Standing Board Policy 8.10(a)(3) required it to do so. The meeting minutes simply state:

> The board voted to not disallow the Family Law Section filing an amicus brief with the Third District Court of Appeal in the case, In the Matter of the Adoption of John Doe and James Doe, supporting the ruling of the trial court judge in that case. The judge ruled F.S. § 63.042(3) unconstitutional and allowed homosexual foster parents to adopt two brothers they had raised for four years. The Board of Governors' action does not constitute The Florida Bar's formal endorsement of the section's position. It acknowledges the subject matter is within the purview of the section's area of expertise and permits the section-composed of and funded entirely by voluntary members-to go forward. No Bar

> membership fees will be expended to advocate the brief put forth by the section and the amicus will be written by a volunteer. Board member Larry Ringers recused himself from the vote.

The Florida Bar Board of Governors, Regular Minutes (Jan. 30, 2009), at 5-6. These meeting minutes do not mention whether the Bar determined the divisiveness of homosexual adoption as its policy required.

The only indication of any discussion by the Board of Governors comes from a Florida Bar News article cited by Liberty Counsel. See Pudlow, supra. The article indicates that some members of the Board of Governors considered the merits of homosexual adoption, not the divisiveness of the issue. For instance, one board member is reported as having been moved by the Holocaust and the movie, Judgment at Nuremburg, where the leaders did not do the right thing. Id. at 1. This board member is quoted as saying, "[W]e are the leaders of the Bar" and "I think we should send a message to Floridians that we are here to uphold the law, and we are here to do the right thing." Id. Another board member is quoted as saying, "To consider children are being prohibited from having the right to be adopted by appropriate and very caring individuals is completely wrong, and we should not let that go forth." Id. These comments, indicating support for the merits of the proposed amicus position, do not address the divisiveness issue at all and are contrary to the Board's minutes indicating there was no endorsement.

Even though the issue is divisive, the Board of Governors could have voted to waive the application of its

Standing Board Policy 8.10(a)(3) with a two-thirds vote, pursuant to its bylaws.[15] Yet it did not do so. Specifically, Bylaw 2-9.2 provides:

> The board of governors shall adopt standing board policies governing the internal administration and operation of The Florida Bar and the board of governors. The board of governors may adopt, amend, or rescind standing board policies by a majority vote of the membership of the board of governors provided any amendment to any standing board policy shall not be effective until 30 days after adoption. Such standing board policies may be adopted, rescinded, or amended by a majority vote of those present at any regular meeting of the board of governors provided advance written notice is given to the members of the board of governors of the

---

[15] In footnote 13, the majority notes a potential inconsistency between the Bar's standing board policies regarding voluntary sections and this Court's decisions. See majority op. at 15, n. 13. I do not see an inconsistency. The Bar's policies do not include an absolute prohibition against sections performing activities on divisive issues, but the procedural requirement for a waiver must be followed. See R. Regulating Fla. Bar, Bylaw 2-9.2 (authorizing a waiver of standing board policies by a two-thirds vote). There are very good reasons why the Bar may wish to retain its current policies, but I agree with the majority that this issue is not before us.

> proposed adoption, repeal, or amendment of any standing board policy. The provision of any standing board policy may be waived by a two-thirds vote of those present at any regular meeting of the board of governors.

R. Regulating Fla. Bar, Bylaw 2-9.2 (emphasis added).

Voting to waive the standing board policy is the only method by which the Bar may take contrary action, as approved by this Court. See Fla. Bar re Rules Regulating the Fla. Bar, 494 So.2d 977, 992-93 (Fla.1986) (adopting Bylaw 2-9.2); see also R. Regulating Fla. Bar 1-11.2, 1-11.3 (explaining that this Court reviews objections to proposed bylaws and may amend bylaws adopted by the Bar at any time). This Court is not micromanaging the affairs of the Bar by requiring it to comply with the bylaws approved by this Court.

There are no provisions for an implicit waiver in any applicable standing board policy provisions or bylaws of the Bar. However, the majority holds that the unanimous vote by the Board implicitly waived the Bar's standing board policy. See majority op. at 17-18. Contrary to the majority's holding, Bylaw 2-9.2 expressly requires a two-thirds vote to waive such policies. And because Bylaw 2-9.2 expressly requires a waiver by a two-thirds vote, a two-thirds vote is the only possible method of waiving standing board policies. See Bush v. Holmes, 919 So.2d 392, 407 (Fla.2006) (defining the principle of construction "expressio unius est exclusio alterius," or "the expression of one thing implies the exclusion of another," by explaining that when the manner of doing an act is prescribed, "the manner prescribed is

exclusive"). Therefore, the Board's unanimous approval of the Family Law Section's amicus brief does not constitute a legally recognizable waiver of Standing Board Policy 8.10(a)(3).

Significantly, the Bar must comply with Robert's Rules of Order when conducting its meetings, which do not permit an implicit waiver. See R. Regulating Fla. Bar, Bylaw 2-9.6 ("The current edition of Robert's Rules of Order shall be the rules that govern the conduct of all meetings of The Florida Bar, its board of governors, its sections, divisions, and committees."). Robert's Rules states that rules contained in an organization's bylaws "cannot be suspended-no matter how large the vote in favor of doing so or how inconvenient the rule in question may be-unless the particular rule specifically provides for its own suspension, or unless the rule properly is in the nature of a rule of order."Henry M. Robert III et al., Robert's Rules of Order Newly Revised § 25, at 254 (10th ed.2000). The Bar's Bylaw 2-9.2, which provides for the waiver of standing board policies by a two-thirds vote, does not specifically provide for the suspension of Bylaw 2-9.2 itself and is not a rule of order. As a result, the particular manner for waiving standing board policies prescribed by Bylaw 2-9.2 cannot be suspended "no matter how large the vote in favor of doing so or how inconvenient the rule in question may be."Id; see also id. § 25, at 257-58 (explaining that suspending a rule by unanimous consent, rather than by making a formal motion to suspend the rules, is accomplished prospectively by asking for unanimous consent and then asking if anyone objects).

Therefore, under Robert's Rules of Order, a unanimous vote does not retroactively cure the Bar's failure to

comply with Standing Board Policy 8.10(a)(3) or waive the policy in the manner prescribed by Bylaw 2-9.2. The majority's holding that there was an implicit waiver of Standing Board Policy 8.10(a)(3) is contrary to the Bar's specific bylaws regarding how a waiver may be obtained.

II. This Court Has a Duty to Supervise The Florida Bar

The Florida Bar is "an official arm of the court." R. Regulating Fla. Bar, ch. 1, Intro. Indeed, the Board's actions are "subject always to the direction and supervision of the Supreme Court of Florida." R. Regulating Fla. Bar 1-4.2(a). Therefore, as the administrative head of the Bar, this Court not only has the authority, but the duty, to require the Bar to follow its own bylaws and policies.

Every day, the Bar holds attorneys accountable for their actions in compliance with the rules of The Florida Bar. See generally R. Regulating Fla. Bar 3-3.1 (designating the Bar as an agency of this Court for the purpose of enforcing the rules of conduct for attorneys). When these rules are not complied with, there are disciplinary consequences to the lawyers. See R. Regulating Fla. Bar 3-5.1 (listing the disciplinary consequences to lawyers who are found guilty of violating the rules). It is not too much to ask for the Bar to comply with its own requirements when we expect lawyers to comply with the requirements of the Bar. See R. Regulating Fla. Bar 1-11.1 (explaining that the Bar's bylaws "govern the method and manner by which the requirements" of the Bar's rules are met).

The majority concludes that this Court should not require the Bar to comply with its own policies and bylaws

because the Bar has the authority to act in regards to sections and, therefore, its actions are not ultra vires. See majority op. 15-18. I do not agree with this conclusion or the particular use of the terms "authority" and "ultra vires" that the majority employs to arrive at its conclusion.

"Authority" is defined as "[t]he power to command, enforce laws, exact obedience, determine, or judge."American Heritage Dictionary 142 (2d coll. ed.1991). And, as the majority notes, "ultra vires" is defined as "unauthorized; beyond the scope of power allowed or granted by a corporate charter or by law."Majority op. at 16 (quoting Black's Law Dictionary 1559 (8th ed.2004)). However, the majority's use of these terms does not acknowledge that certain requirements, such as compliance with rules, must be met for the exercise of authority to be legal and proper. For instance, a police officer has the authority to conduct searches but not before fulfilling the procedural requirement of obtaining a valid warrant. See generally Ybarra v. Illinois, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979); see also Word of Life Ministry, Inc. v. Miller, 778 So.2d 360, 363 & n. 3 (Fla. 1st DCA 2001) ("Even if those voting on May 24, 1978, had been authorized to elect directors, the elections were void for failure to observe restrictions imposed by the articles of incorporation which required directors to be members of the corporation;" electing individuals as directors did not confer membership because of specific bylaw procedural requirements for membership). Therefore, unlike the majority, I conclude that the Bar only has the authority to approve a section's amicus brief when, in doing so, the Board complies

with all applicable bylaws and standing board policies.[16]

In particular, I respectfully disagree with the majority's statement that "the Court will not interfere with or micromanage the activities of the Bar's sections, or the approval of those activities by the Bar, unless the Bar's actions regarding the scope of the activities of its voluntary sections are clearly outside the Bar's authority." Majority op. at 16. This statement is overly broad because there is nothing outside the Bar's authority, as the majority uses the term "authority," when it comes to the activities of the sections. Sections are created or abolished by the Bar's Board "as deemed necessary or desirable." R. Regulating Fla. Bar, Bylaw 2-7.3. The sections' bylaws, which define the scope and purpose of the sections, are approved by the Board. R. Regulating Fla. Bar, Bylaw 2-7.1. And the sections, which are integral parts of the Florida Bar, must work under the Board's supervision to accomplish their goals and purposes. R.

---

[16] Additionally, it appears the majority misconstrues Liberty Counsel's argument when the majority states that "the decision whether to allow an entity to file an amicus brief is ordinarily a decision made by the court in which permission is sought rather than a decision for this Court, in the exercise of our supervisory authority over the Bar." Majority op. at 15. Liberty Counsel does not argue that this Court should decide whether the Third District Court of Appeal should grant the Family Law Section's motion to file an amicus brief. Instead, Liberty Counsel argues that this Court should not allow the Bar to approve the Family Law Section's filing of an amicus brief in the Third District without first complying with its own bylaws and standing board policies.

Regulating Fla. Bar, Bylaw 2-7.2. But the majority's statement indicates that this Court will never act to supervise the Bar in its actions relating to sections.

As the administrative head of the Florida Bar, we simply cannot abdicate our duty to supervise the Bar. See art. V, § 15, Fla. Const. ("The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted."); Askew v. Cross Key Waterways, 372 So.2d 913, 920-21 (Fla.1979) (explaining that the nondelegation doctrine prohibits the delegation of constitutional functions to others).

III. Conclusion

Because the Bar failed to comply with or waive its Standing Board Policy 8.10(a)(3), and this Court has the duty to supervise the Bar, I would grant Liberty Counsel's request for injunctive relief without prejudice to the requisite vote on whether to waive the standing board policy. Accordingly, I respectfully dissent.

CANADY, J., concurs.

Original Proceeding - The Florida Bar

Mathew Duane Staver, Maitland, Florida, and Mary E. McAlister, Lynchburg, Virginia, for Petitioner.

Barry Scott Richard of Greenberg Traurig, P.A., Tallahassee, Florida, for Respondent.

APPENDIX B

RULES REGULATING THE FLORIDA BAR

(Relevant Excerpts)

Chapter 1 General

The Supreme Court of Florida by these rules establishes the authority and responsibilities of The Florida Bar, an official arm of the court.

1-2. Purpose

The purpose of The Florida Bar shall be to inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence.

Rule 1-4.2. Authority; supervision

(a) Authority and Responsibility. The board of governors shall have the authority and responsibility to govern and administer The Florida Bar and to take such action as it may consider necessary to accomplish the purposes of The Florida Bar, subject always to the direction and supervision of the Supreme Court of Florida.

(b) Duty to Furnish Information to Court. The board of governors shall furnish to each member of the Supreme Court of Florida the following:

(1) The minutes of each meeting of the board of

governors of The Florida Bar and each meeting of its executive committee except when acting in a prosecutorial role in a disciplinary or unlicensed practice of law matter.

(2) Any written report of any section, committee, or division of The Florida Bar submitted to the board of governors that is either accepted or adopted by the board.

(3) All rules, policies, or procedures adopted by the board of governors under the authority granted to the board by the court.

(4) Such additional information and material as may be requested by any member of the court.

(c) Powers of Court. The Supreme Court of Florida may at any time ratify or amend action taken by the board of governors under these rules, order that actions previously taken be rescinded, or otherwise direct the actions and activities of The Florida Bar and its board of governors.

Rule 1-4.5. Sections

The board of governors may create and abolish sections as it may consider necessary or desirable to accomplish the purposes and serve the interests of The Florida Bar and of the sections and shall prescribe the powers and duties of such sections. The bylaws of any section shall be subject to approval of the board of governors.

Chapter 2 Bylaws of the Florida Bar

2-7. Sections and Divisions

Bylaw 2-7.1. Rules applicable to sections and divisions

All sections and divisions are governed by the provisions of the Rules Regulating The Florida Bar, this chapter, and the bylaws of the sections and divisions as approved by the board of governors and have the scope, powers, duties, and functions expressed in those documents.

Bylaw 2-7.2. Duties

It is the duty of each section and division, as an integral part of The Florida Bar, to work in cooperation with the board of governors and under its supervision toward accomplishment of the aims and purposes of The Florida Bar and of that section or division.

Bylaw 2-7.3. Creation of Sections and Divisions

Sections and divisions may be created or abolished by the board of governors as deemed necessary or desirable.

(a) Sections. The following sections of The Florida Bar have been created by the board of governors:

(1) Administrative Law Section;

(2) Appellate Practice Section;

(3) Business Law Section;

(4) City, County and Local Government Law Section;

(5) Criminal Law Section;

(6) Elder Law Section;

(7) Entertainment, Arts, and Sports Law Section;

(8) Environmental and Land Use Law Section;

(9) Equal Opportunities Law Section;

(10) Family Law Section;

(11) General Practice, Solo and Small Firm Section;

(12) Government Lawyer Section;

(13) Health Law Section;

(14) International Law Section;

(15) Labor and Employment Law Section;

(16) Practice Management and Development Section;

(17) Public Interest Law Section;

(18) Real Property, Probate, and Trust Law Section;

(19) Tax Section;

(20) Trial Lawyers Section; and

(21) Workers' Compensation Section.

(b) Divisions. The following divisions of The Florida Bar have been created by the board of governors:

(1) Out-of-State Division; and

(2) Young Lawyers Division.

Bylaw 2-7.4. Procedure for creation of sections and divisions

Those seeking approval of the board of governors to establish a section or division shall prepare and submit proposed bylaws for approval by the board of governors. They shall also inform the board of governors of the justification for establishing the section or division, the proposed dues, proposed budgeting, and proposed function and program of the section or division.

Bylaw 2-7.5. Legislative action of sections and divisions

(a) Limits of Legislative Involvement. Sections and divisions may be involved in legislation that is significant to the judiciary, the administration of justice, or the fundamental legal rights of the public or interests of the section or division or its programs and functions.

(b) Procedure to Determine Legislative Policy. Sections and divisions shall be required to adopt and follow a reasonable procedure, approved by the board of governors, for

determination of legislative policy on any legislation.

(c) Notice to Executive Director. Sections and divisions shall notify the executive director immediately of determination of any section or division action regarding legislation.

(d) Identification of Action. Any legislative action taken by a section or division shall be clearly identified as the action of the section or division and not that of The Florida Bar.

Bylaw 2-9.1. Authority of board of governors

In order to accomplish the purposes of The Florida Bar and implement the Rules Regulating The Florida Bar, including this chapter, the board of governors shall have the power and authority to establish policies and rules of procedure on the subjects and in the manner provided in this rule.

Bylaw 2-9.2. Standing board policies

The board of governors shall adopt standing board policies governing the internal administration and operation of The Florida Bar and the board of governors. The board of governors may adopt, amend, or rescind standing board policies by a majority vote of the membership of the board of governors provided any amendment to any standing board policy shall not be effective until 30 days after adoption. Such standing board policies may be adopted, rescinded, or amended by a majority vote of those present at any regular meeting of the board of governors provided advance written notice is given to the members of the board of governors of the proposed adoption, repeal, or amendment of any standing board policy. The provision of any standing board policy may

be waived by a two-thirds vote of those present at any regular meeting of the board of governors.

Bylaw 2-9.3. Legislative policies

(a) Adoption of Rules of Procedure and Legislative Positions. The board of governors shall adopt and may repeal or amend rules of procedure governing the legislative activities of The Florida Bar in the same manner as provided in bylaw 2-9.2; provided, however, that the adoption of any legislative position shall require the affirmative vote of two-thirds of those present and voting at any regular meeting of the board of governors or two-thirds of the executive committee or by the president, as provided in the rules of procedure governing legislative activities.

(b) Publication of Legislative Positions. The Florida Bar shall publish notice of adoption of legislative positions in The Florida Bar News, in the issue immediately following the board meeting at which the positions were adopted.

(c) Objection to Legislative Positions of The Florida Bar.

(1) Any member in good standing of The Florida Bar may, within 45 days of the date of publication of notice of adoption of a legislative position, file with the executive director a written objection to a particular position on a legislative issue. The identity of an objecting member shall be confidential unless made public by The Florida Bar or any arbitration panel constituted under these rules upon specific request or waiver of the objecting member. Failure to object within this time period shall constitute a waiver of any right to object to the particular legislative issue.

(2) After a written objection has been received, the executive director shall promptly determine the pro rata amount of the objecting member's membership fees at issue and such amount shall be placed in escrow pending determination of the merits of the objection. The escrow figure shall be independently verified by a certified public accountant.

(3) Upon the deadline for receipt of written objections, the board of governors shall have 45 days in which to decide whether to give a pro rata refund to the objecting member(s) or to refer the action to arbitration.

(4) In the event the board of governors orders a refund, the objecting member's right to the refund shall immediately vest although the pro rata amount of the objecting member's membership fees at issue shall remain in escrow for the duration of the fiscal year and until the conclusion of The Florida Bar's annual audit as provided in bylaw 2-6.16, which shall include final independent verification of the appropriate refund payable. The Florida Bar shall thereafter pay the refund within 30 days of independent verification of the amount of refund, together with interest calculated at the statutory rate of interest on judgments as of the date the objecting member's membership fees at issue were received by The Florida Bar, for the period commencing with such date of receipt of the membership fees and ending on the date of payment of the refund by The Florida Bar.

(d) Composition of Arbitration Panel. Objections to legislative positions of The Florida Bar may be referred by the board of governors to an arbitration panel comprised of 3 members of The Florida Bar, to be constituted as soon as practicable following the decision by the board of governors

that a matter shall be referred to arbitration.

The objecting member shall be allowed to choose 1 member of the arbitration panel, The Florida Bar shall appoint the second panel member, and those 2 members shall choose a third member of the panel who shall serve as chair. In the event the 2 members of the panel are unable to agree on a third member, the chief judge of the Second Judicial Circuit of Florida shall appoint the third member of the panel.

(e) Procedures for Arbitration Panel.

(1) Upon a decision by the board of governors that the matter shall be referred to arbitration, The Florida Bar shall promptly prepare a written response to the objection and serve a copy on the objecting member. Such response and objection shall be forwarded to the arbitration panel as soon as the panel is properly constituted. Venue for any arbitration proceedings conducted pursuant to this rule shall be in Leon County, Florida; however, for the convenience of the parties or witnesses or in the interest of justice, the proceedings may be transferred upon a majority vote of the arbitration panel. The chair of the arbitration panel shall determine the time, date, and place of any proceeding and shall provide notice thereof to all parties. The arbitration panel shall thereafter confer and decide whether The Florida Bar proved by the greater weight of evidence that the legislative matters at issue are constitutionally appropriate for funding from mandatory Florida Bar membership fees.

(2) The scope of the arbitration panel's review shall be to determine solely whether the legislative matters at issue are within those acceptable activities for which compulsory

membership fees may be used under applicable constitutional law.

(3) The proceedings of the arbitration panel shall be informal in nature and shall not be bound by the rules of evidence. If requested by an objecting member who is a party to the proceedings, that party and counsel, and any witnesses, may participate telephonically, the expense of which shall be advanced by the requesting party. The decision of the arbitration panel shall be binding as to the objecting member and The Florida Bar. If the arbitration panel concludes the legislative matters at issue are appropriately funded from mandatory membership fees, there shall be no refund and The Florida Bar shall be free to expend the objecting member's pro rata amount of membership fees held in escrow. If the arbitration panel determines the legislative matters at issue are inappropriately funded from mandatory membership fees, the panel shall order a refund of the pro rata amount of membership fees to the objecting member.

(4) The arbitration panel shall thereafter render a final written report to the objecting member and the board of governors within 45 days of its constitution.

(5) In the event the arbitration panel orders a refund, the objecting member's right to the refund shall immediately vest although the pro rata amount of the objecting member's membership fees at issue shall remain in escrow until paid. Within 30 days of independent verification of the amount of refund, The Florida Bar shall provide such refund together with interest calculated at the statutory rate of interest on judgments as of the date the objecting member's membership fees at issue were received by The Florida Bar, for the period

commencing with such date of receipt of the membership fees and ending on the date of payment of the refund by The Florida Bar.

(6) Each arbitrator shall be compensated at an hourly rate equal to that of a circuit court judge based on services performed as an arbitrator pursuant to this rule.

(7) The arbitration panel shall tax all legal costs and charges of any arbitration proceeding conducted pursuant to this rule, to include arbitrator expenses and compensation, in favor of the prevailing party and against the nonprevailing party. When there is more than one party on one or both sides of an action, the arbitration panel shall tax such costs and charges against nonprevailing parties as it may deem equitable and fair.

(8) Payment by The Florida Bar of the costs of any arbitration proceeding conducted pursuant to this bylaw, net of costs taxed and collected, shall not be considered to be an expense for legislative activities, in calculating the amount of membership fees refunded pursuant to this bylaw.

APPENDIX C

BYLAWS OF THE FAMILY LAW SECTION

Article X

MISCELLANEOUS PROVISIONS

Section 5. Policy. No action of this section shall be contrary to the policies of The Florida Bar established by its board of governors.

APPENDIX D

STANDING BOARD POLICIES

5.63 Administrative Support Policy

(a) **Generally.** Sections will be charged an administrative support cost of $17.50 per paying section member annually, to reimburse The Florida Bar its expenses for staff support (*e.g.*, program administrator, supervision, and support) to the section plus 80% of The Florida Bar's general and administrative allocation. Each section shall have the total expense used in the calculation of general and administrative allocation reduced by the amount of sponsorships collected in the year. Each section will reimburse The Florida Bar a minimum of $12.50 per paying section member. If a section's annual expense reimbursement does not equal or exceed the basic $17.50 per section member the section may receive a refund of the excess over the $12.50 minimum per paying section member.

(b) **Provisional Support Costs.** If, for 3 consecutive years, any section's expense reimbursement is less than $12.50 per paying section member, that section will be charged a provisional amount described below rather than the figures included in section (a) above. At year end, any section that received a provisional rate will be responsible to The Florida Bar for any support expenses that exceed its provisions rate up to the amount of $17.50 per paying section member.

(1) The provision rates are $12.50 per section member if the prior 3-year reimbursement is $10.50 or less for each year; and

(2) $15.00 per section member if the prior 3-year reimbursement is greater than $10.50 but less than $11.50 for each year.

(c) **Excessive Support Costs.** When a section's administrative support costs exceeds $17.50 per paying section member the Florida Bar will provide support up to an amount calculated at $10.00 per section member (including complimentary members) for the first 1,000 members, but $5 for each sect ion member over 1,000. For sections with less than 1,000 members the minimum reimbursement will be the lesser to $10,000 or the actual costs incurred. Any support cost that exceeds the sum of the $17.50 per section member plus the support from The Florida Bar will be repaid by the section to the Florida Bar at year end.

(d) **Adjustments.** The $17.50 administrative support charge will be adjusted from time to time, using the Consumer Price Index. The adjustment shall be rounded to whole dollar increments. The base date for this calculation will be June 3, 2007. The Florida Bar will notify each section 1 year in advance of any such adjustment.

8.10 Amicus Curiae Filings and Responses to Bar Rules Petitions

(a) Amicus Curiae Positions.

(1) A section of The Florida Bar may adopt a position and submit an amicus curiae brief in pending litigation only when the issue is beyond the scope of permissible legislative or ideological activity of The Florida Bar, or the issue is within the permissible legislative or ideological activity of the bar and the proposed brief does not take a position that is inconsistent with an official position of the bar and the requirements of subdivision (3) are met.

(2) A division or committee of The Florida Bar may adopt a position and submit an amicus curiae brief in pending litigation only when the issue is beyond the scope of permissible legislative or ideological activity of The Florida Bar, or the issue is within the permissible legislative or ideological activity of the bar and the proposed brief does not take a position that is inconsistent with an official position of the bar and the requirements of subdivision (3) are met.

(3) Divisions, sections and committees may not adopt a position or submit an amicus curiae brief in pending litigation unless the issue involved is within the area of subject matter

interest of the division, section or committee as described in its bylaws or official charge, and the issue is not one that carries the potential of deep philosophical or emotional division among a substantial segment of the membership of the bar.

(4) Each division, section or committee shall provide notice to the executive committee or board of governors of the nature of the litigation, the position(s) sought to be taken by the group as amicus curiae, the anticipate effect of the litigation and the final decision, the need for the division, section or committee to take the proposed position, the absence or existence of conflict with any previous position adopted by either the board of governors or any other subunit of The Florida Bar and shall indicate if such other group has been contacted about its position. Except in emergency situations, such notice, along with a draft of the amicus curiae brief, shall be provided at least 10 days prior to the filing of the brief. In emergency situations both the 10-day requirement and the prior submission of a completed amicus curiae brief requirement may be waived by the president of The Florida Bar.

(5) A division, section or committee shall not file its motion for leave to appear or proposed amicus curiae brief without express consent of the executive committee or the board of

governors.

(6) Any amicus curiae position taken by a division, section or committee shall be clearly identified as the action of the group and not that of the Florida Bar, unless the executive committee or board of governors directs otherwise.

900 LEGISLATIVE POLICIES AND PROCEDURES

9.10 Generally.

(a) **Applicability.** These policies and procedures, combined with the amicus curiae policy and procedures set forth elsewhere herein, are in furtherance of the board of governors' powers to establish, maintain, and supervise a program of The Florida Bar for providing information and advice to the courts and all other branches of government concerning current law and proposed or contemplated changes in the law.

(b) **Authority.** The Florida Bar shall not advocate a legislative or political issue unless it is determined by the board of governors that the matter is related to the purposes of The Florida Bar as set forth in the Rules Regulating The Florida Bar and is otherwise consistent with applicable court decisions. Those authorities and these policies shall further govern the limits of and procedures regarding legislative or political involvement by bar committees, sections and divisions.

9.50 Legislative Activities of Sections

(a) **Authority.** A section may be recognized by the board of governors as taking action on or advocating a position on a legislative or political issue only when all of the following criteria are met:

(1) the issue involved is within the section's subject matter jurisdiction as described in the section's bylaws;

(2) the issue is beyond the scope of permissible legislative or political activity of The Florida Bar, or the issue is within the permissible scope of legislative or political activity of The Florida Bar but the proposed section position is not inconsistent with an official position of the bar on that issue;

(3) the issue is not one that carries the potential of deep philosophical or emotional division among a substantial segment of the membership of the bar.

(b) **Notice of Bar Positions**. The executive director shall give periodic notice to the sections of their recognized positions or activity and the official positions of The Florida Bar on legislative or other political issues.

(c) **Notice of Section Proposals.** Sections shall advise The Florida Bar of proposed legislative or political activity by providing written notification to the executive director. The proposal shall be circulated to all divisions, sections and committees that may be interested in the issue, and such written notification shall identify all such groups to which the proposal has been submitted for comment, and reciting the comments received. When a decision is needed within 60 days, the notice shall include an explanation of the need for an expedited decision, and shall request a specific deadline for a decision by the bar as to the criteria in subdivision (a).

(d) **Deadline for Bar Response.** When an expedited decision is not requested, review of proposed section legislative or political activity shall be by the legislation committee and the board of governors. Unless said review is completed and a written notice of decision received by the section within 60 days of the executive director's receipt of the section's notice pursuant to subdivision (c), the section may advocate a position or take any proposed action unless advised otherwise by a court of competent jurisdiction. When an expedited decision is requested, review may be by the executive committee. When the legislature is in session or an emergency exists, and the executive committee is unable to act, review may be by the president in consultation with the president-elect and the chair of the legislation committee, if possible.

(e) **Prohibition from Advancing Section Position.** Upon review of a section's proposed legislative or

political activity, the bar may prohibit the section from acting or advancing a position only when it finds that the position fails to meet the criteria of subdivision (a).

(f) **Prompt Notice Required.** Whenever the review of a section's proposed legislative or political activity pursuant to subdivision (d) is completed in less than 60 days, the bar shall immediately give written notice to the section of the decision.

(g) **Review of Executive Committee or President's Action.** When a decision that a section's proposed legislative or political activity does not meet the criteria of subdivision (a) is made by other than the board of governors pursuant to subdivision (d), the section shall have the right to have the decision reviewed by the board of governors at the meeting immediately following the date of the notice to the section required in subdivision (f). (h) Procedures Required. Sections engaging in legislative or political activities must adopt a procedure for determining legislative or political positions, submit the procedure to the board of governors and receive the board's approval. Section legislative procedures must include but are not limited to:

(1) establishment of a legislation committee composed of not less than 3, with such members appointed for staggered terms;

(2) a 2/3 vote of the members of the section's executive council present, finding the

proposed legislative or political activity to be within the scope of subdivision (a), and a majority vote of those members present approving the position.

(i) **Coordination with Florida Bar.** In furtherance of a section's obligation to clearly distinguish its legislative and political activity from that of The Florida Bar, section have a continuing duty to coordinate their legislative and political activity with the bar and to advise of any section representatives who might make direct personal contact with governmental officials in furtherance of any section position or activity on a legislative or political issue.

APPENDIX E

THE FLORIDA BAR BOARD OF GOVERNORS
Regular Minutes
August 13, 2004
Ponte Vedra Beach Resort and Inn
Ponte Vedra Beach, FL

Pursuant to notice, the regular meeting of the Board of Governors of The Florida Bar was called to order at 8:30 a.m. on Friday, August 13, 2004 at The Ponte Vedra Resort and Inn, Ponte Vedra Beach, Florida, with President Kelly Overstreet Johnson presiding.

1. Roll Call

Board members present:
Kelly Overstreet Johnson, President
Alan B. Bookman, President-elect Ross M. Goodman, First Judicial Circuit

Lawrence E. Sellers, Jr., Second Judicial Circuit Michael J. Glazer, Second Judicial Circuit Gregory S. Parker, Third Judicial Circuit

S. Grier Wells, Fourth Judicial Circuit Henry M. Coxe, III, Fourth Judicial Circuit William H. Phelan, Jr., Fifth Judicial Circuit Andrew B. Sasso, Sixth Judicial Circuit Chobee Ebbets, Seventh Judicial Circuit Robert A. Rush, Eighth Judicial Circuit Mayanne Downs, Ninth Judicial Circuit Russell W. Divine, Ninth Judicial Circuit Warren W. Lindsey,

Ninth Judicial Circuit

Francisco R. Angones, Eleventh Judicial Circuit Ervin A. Gonzalez, Eleventh Judicial Circuit Jennifer R. Coberly, Eleventh Judicial Circuit Steven E. Chaykin, Eleventh Judicial Circuit Clifford W. Sanborn, Fourteen Judicial Circuit John G. White, III, Fifteenth Judicial Circuit Jerald S. Beer, Fifteenth Judicial Circuit

Scott G. Hawkins, Fifteenth Judicial Circuit Amy L. Smith, Fifteenth Judicial Circuit Alan C. Brandt, Seventeenth Judicial Circuit

Nancy W. Gregoire, Seventeenth Judicial Circuit Henry Latimer, Seventeenth Judicial Circuit Jesse H. Diner, Seventeenth Judicial Circuit Frank C. Walker, II, Seventeenth Judicial Circuit Clifton A. McClelland, Eighteenth Judicial Circuit Richard Tanner, Out of State

Gary J. Leppla, Out of State Brian D. Burgoon, Out of State

Michael J. Faehner, YLD President Jamie Billotte Moses, YLD President-elect

Solomon L. Badger, III, Ed. D., Public Member

Board members absent:

Murray B. Silverstein, Sixth Judicial Circuit
Robert M. Brush, Tenth Judicial Circuit

David Rothman, Eleventh Judicial Circuit

Henry T. Courtney, Eleventh Judicial Circuit
Sharon L. Langer, Eleventh Judicial Circuit
Benedict P. Kuehne, Eleventh Judicial Circuit
Kimberly A. Bald, Twelfth Judicial Circuit
Timon V. Sullivan, Thirteenth Judicial Circuit
John F. Rudy, II, Thirteenth Judicial Circuit
Gwynne A. Young, Thirteenth Judicial Circuit
James S. Lupino, Sixteenth Judicial Circuit
Harold G. Melville, Jr., Nineteenth Judicial Circuit
J. Christopher Lombardo, Twentieth Judicial Circuit
A. Lawrence Ringers, Twentieth Judicial Circuit
Ian Comisky, Out of State
J. Blair Culpepper, Public Member

Staff attending the meeting:

John F. Harkness, Jr., Executive Director
Paul F. Hill, General Counsel
Tina Ruffin, Assistant to the President
Dana Wood, Secretary to the Board of Governors
Austin Newberry, YLD Program Administrator
Elizabeth Tarbert, Director of Ethics and Advertising
Gary Blankenship, Senior Editor, Florida Bar News
Allen Martin, Director Finance and Accounting
Tony Boggs, Director Legal Division
Mary Ellen Bateman, Director, Ethics, Advertising and Professionalism Division

Mike Tartaglia, Director of Programs Division
Ken Marvin, Director of Lawyer Regulation
Francine Walker, Director of Public Information

2. Guests

In addition to other individuals indicated hereafter, the following guests were present during the Board meeting:

Jane Curran, The Florida Bar Foundation
Fred W. Baggett, Florida Association of Court Clerks and Comptrollers
Stephanie Birtman, Esq., Florida House of Representatives, Committee on Judiciary

3. Invocation and Pledge of Allegiance

Board member Solomon L. Badger, III offered the invocation and pledge of allegiance.

4. Greetings and Other Guest Appearances

The Honorable Timothy J. Corrigan, United States District Court, Middle District of Florida The Honorable Karen K. Cole, Fourth Judicial Circuit, State of Florida

Reginald Luster Esq., President, Jacksonville Bar Association
Laura Bailet, Nemours Children's Clinic

Ben Crump, President of the Virgil Hawkins Chapter

5. Swearing-in of Board Members not present at General Assembly

President Kelly Overstreet Johnson swore in the following board members: Ross M. Goodman, First Judicial Circuit

Greg Parker, Third Judicial Circuit Mayanne Downs, Ninth Judicial Circuit

Russell W. Divine, Ninth Judicial Circuit

Amy L. Smith, Fifteenth Judicial Circuit
John G. White, Fifteenth Judicial Circuit
Alan C. Brandt, Seventeenth Judicial Circuit
Frank C. Walker, II, Seventeenth Judicial Circuit

6. Non-roll Call Grievance Items

Board member Warren Lindsey reported that the non-roll call grievance items were: 4, 11, 17, and 21.

7. Non-Roll call Advertising Appeal Items

Board member Gary Leppla reported that the non-roll call advertising appeal item was: Advertising Appeal 04-01578.

8. APPROVAL OF MINUTES and EXECUTIVE COMMITTEE ACTION

A.	Regular Minutes	May 28, 2004 meeting
B.	Grievance Minutes	May 28, 2004 meeting

C. Executive Committee action taken:

Friday, June 25, 2004
Two items required Executive Committee approval. One involved UPL circuit committee nominations and the other legislative objections.
Item 1: The following seven individuals were nominated to serve on UPL circuit committees: Harry Richard Detwiler, Jr., attorney member, committee 2
Darlene M. Flynn, public member, committee 4
Jack Arthur Moring as chair, attorney member, committee 5
Margaret Stack as chair, attorney member, committee 8 Phil C. Beverly, Jr., attorney member, committee 8

John Lewis Fishel as chair, attorney member, committee 14
Jonathan Dingus, attorney member, committee 14
The Executive Committee approved, by a vote of 9-0, the seven nominations to the UPL circuit committees.
Item 2: The Florida Bar received five objections, of which two are new objectors, to legislative positions #13, 14 & 15 for the current biennium. The date of the next Board meeting was past the applicable deadline for action on these objections, so intervening Executive Committee action was required. The Executive Committee approved, by a vote of 9-0, a pro rated refund in the amount of $5.32 of membership fees to the five objectors to be remitted upon conclusion of the fiscal year.

Wednesday, July 7, 2004

One item required Executive Committee approval involving proposed amendments to six different sets of court rules. Tom Hall, by letter to Miles McGrane dated May 18, 2004,

requested that this matter be submitted to the Court as a fast-track item. The letter specifically requested that one petition be filed on behalf of all the affected rules committees. All the rules committees had voted in favor of these changes.

The only change being made to the affected rules is to substitute the term "magistrate" for the term "master" and to substitute the term "judge" for the term "magistrate" wherever either term appears in the rules, which is required because the Florida Legislature, in Ch. 2004-11, Laws of Fla. (S.B. 192), made similar changes to all of the Florida Statutes containing these terms.

The following rules are affected: Fla.R.Civ.P. 1.200, 1.490

Fla.R.Crim.P. 3.111, 3.120, 3.121, 3.125, 3.130, 3.131, 3.133, 3.220, 3.852 Fla.Prob.R. 5.150, 5.697

Fla.R.Juv.P. 8.060, 8.625
Fla.R.App.P. 9.190, 9.200
Fla.Fam.L.R.P. 12.015, 12.200, 12.490, 12.492, and selected family law forms The Executive Committee voted 10-0 to approve the proposed amendments.

Friday, July 16, 2004

Two items required Executive Committee approval. One involved 2 replacement members on the 2004-2005 UPL standing committee and the other involved nominees for the

vacancy on the 3rd circuit JNC.

Item 1: The following two individuals were nominated to serve on 2004-2005 UPL standing committee:

Avonelle R. MacKerell, attorney member Abraham Issa, attorney member

The Executive Committee approved, by a vote of 11-0, the two nominations to the 2004-2005 UPL standing committee.

Item 2: The following three individuals were recommended as nominees to the Governor for a vacancy on the 3rd circuit JNC due to the resignation of Christina Johnson in a 2006 term.

Angela M. Cancio was just appointed by the Governor from The Florida Bar list of three nominees which also included Andrew J. Decker, Live Oak, and S. Austin Peele, Lake City. The subsequent vacancy was advertised and the following submitted applications:

Rhett Bullard, White Springs
Kathleen M. Bishop, Perry (who was just replaced by Cancio)
Ernest A. Sellers, Live Oak

The following nominees were recommended for the 2006 vacancy: Andrew J. Decker, Live Oak

S. Austin Peele, Lake City
Earnest A. Sellers, Live Oak
The Executive Committee approved, by a vote of 11-0, the three recommended nominations to be sent to the Governor.

Thursday, July 22, 2004

A meeting of the Executive Committee was held by conference call and the following members were in attendance: Kelly Overstreet Johnson, Alan Bookman, Mike Glazer, Mike Fachner, Jesse Diner, Jerry Beer, Mayanne Downs, Sharon Langer, Hank Coxe, David Rothman and Ervin Gonzalez. The following staff members were in attendance: Jack Harkness, Paul Hill and Tina Ruffin. Two items were discussed.

Item 1:
The Executive Committee, by a vote of 11-0, unanimously gave provisional approval to a draft amicus brief from the Elder Law Section in the case of Jeb Bush v. Michael Schiavo (Case No. SC 004-925) now pending before the Supreme Court of Florida. The committee will review a final draft of the section's brief prior to any filing, due Monday, July 26.

All parties in these proceedings - to include attorneys for the governor - have consented to the section's appearance. Standing Board Policy 8.10 otherwise controls amicus matters within the Bar. In considering the section's proposed filing, the Executive Committee opted to allow argument only on the separation of powers issues raised in this case. A separate argument relating to the right of privacy was not approved on behalf of the section, but will be asserted by other amicus the Executive Committee was told.

Also, in anticipation of a further request from the Public Interest Law Section - to be a co-party on the Elder Law Section's final brief or to file a mere endorsement of it - the Executive Committee authorized such action, subject to

appropriate vote of PILS and the preferences of the Elder Law

Section.

Item 2:
The Criminal Procedure Rules Committee requested the Executive Committee approve their report proposing out -of -cycle changes to the Florida Rules of Criminal Procedure. The report was to be filed pursuant to Rule of Judicial Administration 2.130(f), which provides procedure for changes at the court's behest. Each of the proposed changes were in response to a referral from the court.
The first item in the report was in response to the court's request for a proposed amendment by October 1, 2004. The second and third items were referrals based on the recommendations of the court's Jury Innovations Committee, and a referral letter from Tom Hall asking for a report to be filed by August 6. The remaining proposals were based on 2004 legislation for which the court has asked the Bar to submit any needed rules changes through its fast track procedures. Those procedures are designed to allow adoption of rule changes by (or as close as possible to) the effective date of the legislation.

The Executive Committee approved, by a vote of 10-0, the Criminal Procedure Rules Committee's request to approve their report.

9. Consent Calendar

The board of governors approved the following items:

A. UPL Circuit committee nominations August 2004

H. James Parker, Attorney member, Sixth Judicial Circuit Diane Victor Kuenzel, Attorney member, Sixth Judicial Circuit
Alfred Walker Torrence, Jr., Attorney member, Sixth Judicial Circuit Francis J. Macauley, Public member, Sixth Judicial Circuit Rebecca Wilson Ribler, Attorney member, Eleventh Judicial Circuit

Gregory Allan Richards, Jr., Attorney member, Thirteenth Judicial Circuit Scott Douglas Devore, attorney member, Fifteenth Judicial Circuit Johathan Harry Wasserman, Attorney member, Fifteenth Judicial Circuit Keith S. Grossman, Attorney member, Twentieth Judicial Circuit

Aaron A. Haak, Attorney member, Twentieth Judicial Circuit

B. Board Review Committee on Professional Ethics- Removed from consent 1) Advertising Appeal 04-01578
C. Legislative Committee Review
1) New section legislative position requests for the 2004-2006 biennium
a) Business Law Section
i. Opposes legislation to impose income tax on limited liability companies and subchapter 5 corporations.

b) Real Property, Probate & Trust Law Section

i. Supports the revision of F. S. 222.21 (21)(a) to strengthen the exemptions from creditors' claims for IRAs and employee benefit funds or accounts exempt from taxation under the Internal Revenue Code of 1986.
ii. Supports the creation of a consolidated chapter for disclaimers of testamentary and non-testamentary property interests.
iii. Supports the revision of 718.117 F. S. process for terminating condominium property.

c) Family Law Section

i. Supports amendments to F. S. 61.16 and F. S. 742.045 to clarify that the court has authority to award reasonable attorney's fees and costs incurred in establishing both the entitlement and the amount of attorney's fees, costs and suit money to be awarded in a proceeding.

2) Section legislative consultant contracts-Approved
a) Business Law Section- Bill Wiley
b) Family Law Section-Fred Dudley
c) Trial Lawyers Section- Buddy Jacobs
D. Rule 9-2.2 Prepaid Legal Services - Form and Content of Plan Application
Within subdivision (e), increases the prepaid legal services plan application fee from $50 to $125.
E. SBP 15.55 Deferral of Disciplinary Investigation During Civil or Criminal Proceedings
Clarifies that the chief branch discipline counsel, rather than

staff counsel, may approve deferrals; clarifies that bar counsel can determine appropriate proceedings if it becomes apparent that civil authority will not address the misconduct; requires that notice of deferral be given to the designated reviewer.

F. Labor & Employment Law Section Bylaw Changes Within Article V (Terms of Officers and Executive Council Members, etc) adds requirements for those seeking the offices of chair of both the CLE Committee and CLE Subcommittee.
G. Construction Law Certification Committee appointments Kimberly A. Ashby, Chair
Alan C. Brandt, Jr. Bruce Gilmour Alexander
Robert Anthony Emmanuel Melinda S. Gentile
Larry R. Leiby George Joseph Meyer
Clemon Warren Tripp, Jr. Michael Keith Wilson
H. Legal Services of North Florida, Inc. appointment
C. LeDon Anchors, Jr., Okaloosa-Walton Bar Association
I. The Florida Bar Citizens Forum appointments James S. Lupino, Chair
Linda A. Osmundson Anthony J. Abate Roddie F. Bailey Kimberly A. Bald John W. Biesinger, III Barry M. Crown Rebecca Frank Michael H. Greenhill Ivan "Marty" Ford Rudolph J. Frei, M. D. Frederick A. Hamblin Gail E. Honea Belinda Keiser Jennifer N. Mayfield Richard C. Myers Beth Rominger

Dan Simmons Edward A. Strongin

10. Jacksonville Literacy Speakers Bureau

Board member Hank Coxe introduced Reginald Luster, President of the Jacksonville Bar Association, The Honorable Timothy J. Corrigan, The Honorable Karen K. Cole and Laura Bailet, Nemours Children's Clinic of the Jacksonville Literacy Speakers Bureau. Mr. Luster told the board that they care not only because literacy helps our citizens function in society, but because there is also overwhelming evidence that illiteracy endangers public health and public safety. Reading problems adversely affect not only education, but employment, substance abuse, mental health and family stability. A child who cannot read or reads poorly will fail in school and because of such failure is more likely to drop out of school and more like to use drugs, become depressed and violate the law. A shocking 47 percent of our population is functionally illiterate, meaning those individuals cannot read well enough to fill out a job application. The goal of the literacy speakers bureau is to make sure that literacy is a priority.

The Honorable Tim Corrigan, a federal district judge in Jacksonville told the board that he comes to this literacy issue for somewhat selfish reasons. As a federal judge, he sentences 18, 19, 20 and 21 year old defendants to 10 years, 20 years and longer sentences regularly. 85 percent of juvenile delinquents have reading problems and many high school juvenile delinquents read below the 4th grade level. Improving literacy is one effective way to improve the quality of life not only for those directly affected by these programs, but the community as a whole. He told the board that The Florida Bar, local Bar associations and lawyers individually as leaders in our community have a unique opportunity to take a leadership role on the literacy issue.

Laura Bailet, Ph.D. of the Nemours Children's Clinic asked the board: What is dyslexia? She said that it is a neuro-developmental reading disorder, caused by subtle malfunctions in the brain, it is not caused by brain damage, it is not caused by low IQ, it is fundamentally a language based disorder. It is not caused by a vision problem. She said that reading is an unnatural act. There are certain basic functions that our brains are genetically hardwired for such as learning to talk and walk. Reading is not one of those skills. Reading is a relatively late development in human developments. Functional magnetic resonance imaging, a research type of MRI, takes pictures of the brain at work. There are earmarked differences in the normal brains and the dyslexic brains, and the dyslexic brains look very much alike.

When you put dyslexic people into intensive, appropriate remedial training, for several months their brains begin to look like normal brains. About 17 to 20 percent of children experience serious reading problems. Dyslexia occurs across all races, intellectual and socio-economic classes and occurs in all languages. It is possible to identify preschoolers who are at risk of dyslexia. Ms. Bailet stated that because lawyers often hold respected positions in their community, they could be of tremendous help to this effort. She said that early intervention and training is like a vaccine in that it will possibly help a child avoid problems later.
The Honorable Karen K. Cole told the board that The Florida Bar has declared this the year of children. Children who can not read will have problems and are less likely to have meaningful employment.

By combining the talents of lawyers, judges, physicians and psychologist, we can ensure that all of our children know how

to read.

11. Young Lawyers Division Report

Michael Faehner, President of the Young Lawyers Division introduced several members of the Young Lawyers Division board. Faehner reported that the Practicing With Professionalism (PWP) rule to get rid of the deferment for government lawyers is pending before the Supreme Court. There is only one party objecting to the petition and they are anticipating an oral argument on that issue sometime in the fall. Faehner thanked Jerry Beer for working out a new CLE split arrangement for the YLD. He reported that the proposal will be brought to the Board of Governors at their meeting in December so that The Florida Bar Standing Board Policies can be amended. Faehner reported on the diversity symposium. The YLD has studied the report and has designated certain committees to work on implementing and outreaching to various law schools to get more members involved with The Florida Bar.

12. Out of State Practitioners Division Report

Scott Atwood, President of the Out of State Practitioners Division, reported that they looked forward to hosting the board in October in Las Vegas at the out of state board of governors meeting. They are still working on

the social aspect of their plans. They will host a reception for

the board most likely on Friday evening with the International Law Section.

13. Advertising Task Force Report

Task force vice-chair Chobee Ebbets reported that they are the third task force to look at the advertising issue. He informed the board that there are a number of complicated issues and the task force has held numerous meetings. The task force is charged with examining the rules to make them clearer and easier to follow. The task force is also charged with reviewing the advertising evaluation process, including the possibility of requiring prior review of attorney advertisements. The task force hopes to accomplish its task by the end of the fiscal year.

President Johnson has asked that Barry Richard prepare a memo on the history of attorney advertising regulation in Florida and the constitutional issues involved, which will be of assistance to the board in making final decisions on the rules.

14. Budget Committee Report

Committee Chair Jerry Beer reported that the committee unanimously approved and recommended board approval of the five following amendments:

A. Refunds to Legislative Objectors $79, which does not affect the General Fund.

B. The Bar Center Security System$15,926, also not affecting the General Fund.

C. Certification Strategic Communications Plan $50,000, not affecting the General Fund.

D. The Bar Web Cast $8,500 from the General Fund.
E. Annual Meeting Entertainment $46,996 from the General Fund.

The board approved the amendments.

The committee also reported it is considering changing standing board policy 6.21(d), the rule regarding splits of profits from section sponsored certification review courses. The committee may recommend that the board delete Rule 6.21(d) from the standing board policies.

Finally, the animal law committee requested a $5,300 amendment. The budget committee has approved $1,500, pending the animal law committee reporting back with its recommended detail budget The board approved the amendment with a voice vote.

15. Rules of Judicial Administration Committee Report

Past chair Stanford Solomon called in to the board meeting and gave the following report via the telephone. Solomon spoke to the board about the proposed amendments to Florida Rule of Judicial Administration 2.050 intended to clarify the relationship between courts and clerks due to the Revision 7 to Article V. The Rules of Judicial Administration Committee proposed including this sentence in rule 2.050(3): " The clerk of court shall discharge its constitutional and statutory duties at the direction of and in consultation with the chief judge to effectively and efficiently accomplish the administrative plan." Subdivision (9) would have these sentences added: "The clerks of court shall be subject to the direction of the chief judge for the efficient and proper administration of all

courts within the circuit. The clerk of court shall perform all responsibilities required by law and provide such other services for the efficient and proper administration of the court as may be required by administrative order or local rule."

Many members of the board did not agree with the proposed changes to the rule. The board discussed the rule and other modifications to the rule rather than that of the committee. The board's proposed modifications would alter both sections to say the chief judge would have "administrative supervision" rather than "direction" over the clerks. The last sentence of subdivision (9) would be shortened to "The clerk of court shall perform all responsibilities required by law."

Solomon told the board the issue arose when a proposed local rule in the Sixth Circuit was forwarded to the committee. He said a subcommittee was appointed to study the issue, and it concluded that past case law clearly gives judges control over clerk functions that affect court operations.

Trial Court Budget Commission (TCBC) Vice Chair Judge Stan Morris told the board that there were many

battles and compromises while drafting the statute during the legislative session. The outcome was one that both the TCBC and the clerks could live with. Fred Baggett, of the clerks association said the delineations in the Revision 7 laws were carefully worked out over two years. Baggett said that the

clerks are in a supporting role; they operate in support of the courts and under the administrative supervision of the chief judges, but as independent constitutional officers. He also said the clerks would support the compromise language that the board had suggested.

President Johnson told the board that she had received a letter from six legislators: Representative Benson; Representative Goodlette; Representative Negron; Representative Gelber; Representative Seiler; and Senator Rod Smith, which said that the proposed rule infringed on legislative prerogatives and that the legislature has already delineated duties of the courts of clerks. The letter said that the assignment of responsibilities by a judge to a non-judicial constitutional officer without a transfer of funding to match those responsibilities is tantamount to controlling the appropriations process. Citing a 1991 Florida Supreme Court decision the letter said that only the legislature could set the fiscal priorities, thus the proposed rule appears to violate Florida's Separation of Powers doctrine.

The board voted 28-4 to recommend the board of governor's changes to the Rules of Judicial Administration Committee before that committee sends their proposal to the Supreme Court of Florida.

16. Audit Committee Report

Chair Russ Divine reported that the Audit committee had met with John Thomas and Jeff Barbacchi of Thomas, Howell, Ferguson P.A. They are currently reviewing the internal controls and provided the committee their preliminary feedback. They recommended The Bar expand their

engagement so that they could look at the cash disbursements with in The Bar. This requires the board to approve a $4,000 - $6000 contract amendment which the committee recommended. The board concurred and approved the contract amendment with a voice vote.

Divine told the board that the committee is also discussing the role of the Audit committee. The committee will prepare a mission statement.

17. Investment Committee Report

Chair Jay White reported that the Investment committee unanimously voted to renew the contract with The Bar's financial advisors at Morgan Stanley and recommended that the board approve the contract. The board concurred with the committee and approved the contract.

The committee also unanimously voted to move some of the large cap funds from the American Funds to NWQ, based on the advise from The Bar's advisor James Bagwell. The board concurred and approved the move with a voice vote.

18. Legislation Committee Report

Vice Chair Frank Angones reported that the committee heard presentations by the Family Law Section and the Public Interest Law Section regarding their separate legislative position requests to lobby for removal of the statutory ban on homosexual adoptions and institution of a "best interests" standard to determine who may adopt in Florida. He told the board that after hearing from both sections, the committee discussed the divisiveness of the issue and the extent of

lawyers' awareness about it. Thereafter, Evan Marks, chair of the Family Law Section, and Deborah Schroth, legislative chair of the Public Interest Law Section, withdrew the two requests in order for the sections to further inform the Bar and to try to gain the support of more Bar sections. Both PILS and the Family Law Section intend to resubmit their requests to the board for the December meeting. Angones reminded the board that, per SBP 9.20(d), the Bar biennially sunsets all its legislative positions. Sections are given an opportunity to request that some of their legislative positions be reactivated and rolled over to the next legislative biennium. The committee recommended to the board that it reactivate all requested section rollover positions. The board concurred and approved the recommendation by voice vote. No Florida Bar legislative positions were recommended for consideration or reactivation at this time. Angones reported that the committee recommended that the board approve the legislative consulting contracts for Steve Metz, the Bar's chief legislative consultant, as well as those for Doug Bruce, Matt Bryan, Pamela Burch Fort, Mike Harrell, Julie Myers, Michelle Lorenzo Palacio and Herb Sheheane, Jr.,

who serve as additional legislative consultants for the Bar. The board concurred and approved the contracts in a voice vote.

19. Board Review Committee on Professional Ethics Report

Chair Gary Leppla reported that the committee considered the

following items:
ADVERTISING APPEAL 04-01578, which was removed from the consent calendar. Advertising Appeal 04-01578 concerns application of Rule 4-7.2(b)(1)(B), prohibiting statements that refer to past results to a print advertisement. Staff rendered an opinion on February 19, 2004, that the language "We Measure Success by Our Clients' Satisfaction" improperly refers to past results, in violation of Rule 4-7.2(b)(1)(B). The Standing Committee on Advertising upheld staff's opinion on April 21, 2004. The attorney subsequently requested Board of Governors review. The Board Review Committee voted 5- 0 to remove the item from the board's consent calendar and to recommend that the Board of Governors reverse the Standing Committee on Advertising, finding the language permissible. The board concurred in the recommendation of the Board Review Committee.

Changes to the Florida Bar Procedures for Ruling on Questions of Ethics and the Florida Bar Procedures for Issuing Advisory Opinions Relating to Lawyer Advertising or Solicitation

Staff requested proposed changes to the Florida Bar Procedures for Ruling on Questions of Ethics and the Florida Bar Procedures for Issuing Advisory Opinions Relating to Lawyer Advertising or Solicitation. The change would correct the bar headquarters address to which requests for opinions and requests for review of opinions must be sent. Changes to these procedures are final when approved by the board, in accordance with Bylaw 2-9.4, Rules Regulating The Florida Bar. The Board Review Committee voted 5-0 to adopt the changes to the procedures.

The board heard the informational report of the committee at first reading, directed that an official notice be placed in the bar News of the proposed change, and directed that the item be returned to the board for second reading and final action at the board's December 2004 meeting.

20. Communications Committee Report

Chair Mike Glazer reported that the communications committee met and discussed the plans of the Board of Legal Specialization and Education to implement a public relations program directed at both lawyers and the public to provide education on certification. The BLSE had considered hiring an outside public relations firm, however, the committee recommended that the program be supervised in-house. The Bar has contracted with an accredited public relations professional, Lisa Garcia, APR, owner of PR Florida, whose sole job, on a part-time basis, is this program. The one-year program will be conducted within the Bar structure, using Bar resources and assuring that all Bar messages are integrated and coordinated.

Glazer told the board that the committee plans to look further at the results of the member communications audit. It included a number of recommendations, including taking a closer look at the Bar News, the Bar Journal, and the Bar Web site. The committee will be working on several communications initiatives, including the Kids Deserve Justice license plate, and will be looking at the Journal/News editorial board guidelines which have not been reviewed since 1982.

The committee discussed the Citizens Forum and considered

ways to increase forum activities and input to the board. Glazer told the board that board member Jim Lupino is the chair of the forum and that board member Kimberly Bald is the board liaison and communications committee liaison.

21. Special Committee to Review the ABA Model Rules 2002

Bar Ethics Counsel Elizabeth Tarbert reported that Chair Adele Stone was unable to attend the meeting due to Hurricane Charley. Tarbert said that the report was the culmination of 3 years of work. The special committee made their recommendations based on changes made by the ABA Ethics commission 2000 to the ABA model rules. Tarbert explained that there was a prior committee in 2001 that made recommendations to the Florida delegates to the ABA House of Delegates. The ABA voted in both February and August of 2002 on their changes. This special committee was then appointed to study the changes. The special committee issued an interim report in April 2003, which was circulated to all Bar sections and committees for comment. The committee received numerous comments, adopted some of the proposed

changes and declined to adopt others. The special committee issued a final report to the board in December 2003. The board circulated the final report and received additional comments. The special committee met and made recommendations on those comments to the board in March. The Disciplinary Procedures Committee (DPC) met in March

and approved all of the changes, with the exception of an addition to the comment to Rule 4-1.4, which stated "Client telephone calls should be promptly returned or acknowledged." The Rules Committee met in March and approved all of the proposed changes. The board was scheduled to take final action on the report in May 2004, but received additional comments from the City, County & Local Government Law Section (CCL) as a hand carry item. The board deferred action until the following board of governors meeting. The special committee met with representatives from the CCL to discuss the recommended changes, adopted some of the changes and declined to adopt others. Representatives of the CCL and special committee met with the DPC to address the CCL's concerns. The DPC voted to recommend that the board adopt the recommendations of the special committee. Board member Robert Brush submitted a separate amendment to the comment to Rule 5-1.1 that clarified a lawyer's duty to hold funds in trust only where the lawyer had an independent legal duty to a third party. That amendment was not reviewed by the special committee. Board member Cliff McClelland moved Brush's amendment, and the board approved the amendment.

Board member Robert Rush voiced objections to some of the rule amendments based on the concerns raised by the CCL. He offered two amendments, both of which failed by a voice vote.

The board concurred with recommendations of the DPC and the special committee and approved the amendments, including the McClelland/Brush amendment, and including the DPC's proposed deletion of the comment to Rule 4-1.4 as noted above.

22. Program Evaluation Committee Report

Chair Richard Tanner reported that the mission of the Program Evaluation Committee (PEC) is to evaluate the programs at The Florida Bar. The PEC met and considered the creation of the Animal Law Committee. The proponents of the committee have submitted the applications and met the prerequisites procedurally. The PEC voted unanimously to create the Animal Law Committee, with the caveat that it will not be an animal rights committee, but rather one that deals with laws relating to animals. The PEC recommended to the board that they approve the committee as an interim committee to be reviewed after 1 year, rather than the usual 3 years. The board concurred with the PEC and approved the creation of the committee.

The PEC also looked at the Clients' Security Fund. Tanner told the board that the Clients' Security Fund has very substantial discretionary authority. The PEC feels that the discretionary authority is adequate for all of the purposes which are anticipated that the fund may be addressing in the future, including increasing the magnitude and multitude of new clients. The PEC suggested that there be no further review of the fund.

The Education Law Committee received its triennial review. The PEC noted that there seems to be a decline in membership of the committee. The PEC recommended allowing the Education Law Committee to continue to exist. The board concurred and approved the continual existence of the committee.

Tanner told the board that the PEC is in the process of

reviewing the Board of Legal Specialization and Education (BLSE). They are looking at the existing certification requirements, some of which are archaic, such as geography, gender and racial issues. PEC also reviewed suggested amendments to the BLSE Series 500 policies and some amendments to Rule 6.35. BLSE is revising some of the language for its continuing legal education requirements, how to award credits, and when it will award credits. The PEC recommended that the board approve the BLSE changes with one exception. The issue of how to decide what is an advance program, an intermediate program and a basic program needs to be addressed more clearly. The board concurred with the PEC recommendation and approved the BLSE changes.

Tanner told the board that besides looking at the BLSE certification issue, they will be looking at the Practice Management and Development Section. They will also be looking at the way the Bar manages and supervises the structure of the Bar meetings.

23. Board of Legal Specialization and Education Report

Regular Minutes
August 13, 2004
Page 12

President Johnson reported on the following items which the board approved:

Board of Legal Specialization and Education Policies
a. 200 Series for final action
1) Policy 2.04 Certification Annual Fee
Within subdivisions (c) and (f), adds new policy to assess $50

late fee for annual fee payments more than 45 days late and increases the annual fee and recertification file extension fees from $100 to $125.

2) Policy 2.11 Exam Preparation and Administration
Within subdivision (e), replaces "approved" with "eligible" to describe certification candidates found to have satisfied the application criteria sufficient to sit for examination.

b. 600 Series for final action
1) Policy 6.03 Calculation and Allowance of Educational Credit
Within subdivision (c), updates policy language to include reference to "mental illness awareness" component of CLER; clarifies that taking the same course more than once during a 3-year CLER reporting cycle will not entitle a member to additional credit.

c. 700 Series Basic Skills Course Requirement for final action
Re-write of BSCR policies to conform to current practice and to reflect updates consistent with existing rules; removes duplicative rule 6-12 language; cites specific references to the rules to eliminate the necessity for further policy revisions upon changes to the rule; eliminates annual reporting of deferral entitlement; eliminates hearing procedures for noncompliance; adjusts delinquency reinstatement fee consistent with rule 1-3.7(b); adds reinstatement provisions consistent with rule 1-3.7(c) through (e); and, eliminates reference to the rules of procedure and burden of proof required in proceedings before BLSE.
1) Policy 7.01 Administration
2) Policy 7.02 Deferment

3) Policy 7.03 Exemption
4) Policy 7.05 Procedures on Noncompliance and Appeal
5) Policy 7.06 Reinstatement
6) Policy 7.08 Rules of Procedure and Burden of Proof

24. Certification Plan Appeals Committee Report

Chair Larry Sellers reported that the certification plan appeals committee hears appeals from people who were denied certification. Much of what the committee looks at and does is confidential. The committee met on August 12, 2004 and decided 2 appeals.

25. Florida Board of Bar Examiners Screening Committee Report

Chair Peter Brandt told the board that the committee unanimously selected Allison K. Bethel, Reginald J. Clyne and Suzanne Meyer Judas for the vacancy created by a resignation of one of the members. The appointee will serve the unexpired term which is approximately four and a half years. The board concurred with the committee recommendations and approved the nominees.

26. Unlicensed Practice of Law Report

The board heard the following on first reading: UPL Report

a. Items on first reading
1) Rule 10-6.1 Hearings
Revises title to read Taking of Testimony instead of Hearings; within subdivision (a), similarly revises reference to when hearings are held, to read when testimony is taken; and within

subdivision (d) additionally revises references to a complainant's right to be present at any circuit UPL committee proceeding rather than hearing further clarified to be when the

respondent is present before the committee to give testimony.

2) Rule 10-8.1 Files
Consistent with proposed revisions to rule 10-6.1, adds "transcribed testimony" to the definitions of the record for UPL and circuit committee purposes.

27. Report of the Symposium on Diversity

President Johnson told the board that she was referring the final report from the diversity symposium to the membership outreach committee, chaired by President-elect Bookman, to have them make recommendations.

28. Special Commission on Lawyer Regulation Report

Chair Hank Coxe reported that the commission had heard from Florida Supreme Court Justice Cantero. Cantero said that the Supreme Court was pleased with the process and the handling of the process by the Florida Bar. However, the courts did have some suggestions, one of which is, when the Florida Bar is dealing with multiple respondents arising from the same transaction or series of transactions. The matters shouldn't come to the courts without the Bar advising the

courts that there are other related cases. Justice Cantero also told the commission that The Florida Bar should revisit if it wants to consider more emergency suspensions. Emergency suspensions have been confined to trust thefts. Justice Cantero suggested that The Florida Bar consider if there are other types of cases in which an emergency suspension would be appropriate, such as cases in which disbarment is likely. Justice Cantero also discussed the consequences of a short term suspension to a solo practitioner compared to the consequences to a lawyer in a large firm. A short term suspension has a more disparate effect on a solo practitioners business, whereas clients can be shared in a large firm as the large firm can shift the suspended lawyers clients to other lawyers in the firm.

Coxe reported that recently Judge Nelly Khouzam, past chair of the conference of circuit judges, and Manny Menendez, Chief judge of the 13th circuit, spoke to the commission about the use of county judges as referees in Bar discipline cases.

Finally, Coxe told the board that the commission will continue to look at changing the image that lawyers protect their own kind and don't respond to complaints. Coxe said that the commission should be finished with its work before the end of President Johnson's term.

29. Time and Place of Next meeting

The next Board of Governors meeting will be held October 12 -17, 2004 in Las Vegas, Nevada. President Johnson reminded the board to return their social information to The Bar.

There being no further business to discuss, the Board of Governors meeting adjourned at 1:30p.m.

Respectfully submitted,

Dana M. Wood

Secretary to the Board of Governors

SUBJECT INDEX

APPROVAL OF MINUTES 3
Regular Minutes 3
Grievance Minutes 3
AUDIT COMMITTEE REPORT 10
BOARD COMMITTEE REVIEW ON PROFESSIONAL ETHICS 7
BOARD OF LEGAL SPECIALIZATION AND EDUCATION REPORT 12
BUDGET COMMITTEE REPORT 8
COMMUNICATIONS COMMITTEE REPORT 10
CONSENT CALENDAR 5
CERTIFICATION PLAN APPEALS COMMITTEE REPORT 12
DISCIPLINARY PROCEDURE COMMITTEE REPORT 4
DIVERSITY SYMPOSIUM REPORT 13

FLORIDA BOARD OF BAR EXAMINERS SCREENING COMMITTEE REPORT 12
GUESTS 2
GUEST APPEARANCES 2
INVESTMENT COMMITTEE REPORT 9
INVOCATION 2
JACKSONVILLE LITERACY SPEAKERS BUREAU 7
LEGISLATION COMMITTEE REPORT 9
NON-ROLL CALL ADVERTISING APPEAL ITEMS 3
NON-ROLL CALL GRIEVANCE AGENDA ITEMS 3
OUT OF STATE PRACTITIONERS DIVISION REPORT 7
PROGRAM EVALUATION COMMITTEE REPORT 11
ROLL CALL 1
RULES OF JUDICIAL ADMINISTRATION COMMITTEE REPORT 8
SPECIAL COMMITTEE TO REVIEW THE ABA MODEL RULES 2002 10
SPECIAL COMMISSION ON LAWYER REGULATION 13
TIME AND PLACE OF NEXT MEETING 13
UNLICENCED PRACTICE OF LAW REPORT 12
YOUNG LAWYERS DIVISION REPORT 7

APPENDIX F

Excerpt from California Bar Journal, March 2002

www.calbar.ca.gov/calbar/2cbj/02mar/index.htm

Whither the Conference of Delegates?

By Nancy McCarthy

Staff Writer

Despite a prickly relationship in recent years, the State Bar and its sometimes controversial Conference of Delegates have begun taking friendly steps toward resolving their differences, moves that may well lead to a separation.

Following a meeting at which both sides were surprised to find they agreed that something has to change, the conference is trying to create a series of proposals or models by the end of this month.

The goal, said Starr Babcock, a bar executive serving on a special 10-person task force looking at the future of the conference, is for the group to establish its own legal independent status and to contract with the bar for limited services. "They'll come to us with proposals to provide them with the independence they need and provide us with the insurance we need that we won't be held politically

See CONFERENCE

Conference may gain its independence from State Bar

Continued from Page 1

liable for their activities," he said.

He suggested a model like the Foundation of the State Bar, a separately incorporated non-profit organization with its own board and governance which, although independently funded, still collects donations through the bar, has office space at bar headquarters and is allowed to use the State Bar name.

"We would contract with them," Babcock said. "If we come up with a reasonable approach and it's clear the bar can provide enough support to them, I think they'll do it." He said he hopes a change might happen by the fall.

Bar President Karen Nobumoto appointed the Task Force on the Conference of Delegates when she took office in September, coincidentally about an hour after the conference rejected a hotly debated resolution to spin off from the bar. "We had spent several years in discord where the staff and the board and the conference could not see eye to eye," she said. "I felt it was important to resolve our outstanding issues and pick an arrangement we could live with."

Nobumoto said she doesn't know what the final outcome will be, but "I want everybody to figure out a way to get along and stop the backbiting."

The Conference of Delegates offers an opportunity for members of local, specialty and minority bar associations throughout the state to have a say in the law-making process

in California. It has a long tradition of providing assistance to legislators by both proposing new laws or amendments to existing statutes and helping lawmakers analyze pending bills. For the most part, the advice deals with often mundane details of interest only to experts.

In recent years, however, its positions on controversial issues have been frequently perceived both in Sacramento and by many bar members as too liberal and its occasional forays into the political arena have gotten the bar into hot water. In the Keller v. State Bar of California decision, for instance, the U.S. Supreme Court pointed to a conference resolution to restrict nuclear power plants when it ruled the bar could not use mandatory member dues to support political lobbying.

Other resolutions, ranging from lifting the cap on medical malpractice judgments to legalizing prostitution and dumping the death penalty, became enough of an irritant to former Gov. Pete Wilson that he cited the conference's activities when he vetoed the bar's dues bill in 1997, a move which led to the virtual shutdown of the bar the following year.

Self-funded but limited

Part of the compromise to finally win a fee bill included a requirement that the conference be funded voluntarily, without benefit of any member dues.

Since that time, the conference has chafed under restrictions the bar has placed on it. Because it is self-funded, its members believe the group should have the freedom to take any stand it wants on proposed legislation. The bar's board of governors, however, has refused to provide that freedom and

requires that all conference activities fall with the purview restrictions imposed by Keller and other court decisions.

In addition, the conference must reimburse the bar for certain services, such as collection of donations and legal analysis of legislation it wants to address.

"Unfortunately, we have not been able to recast the conference in a way that would allow them to return to an open debate of all issues confronting California law without fear that they would interfere with the security of the State Bar as a whole," said Scott Wylie, a member of the board of governors who also serves on the task force. "That has frustrated them, and I know it's frustrated the board and the staff."

Stephen L. Marsh, a San Diego lawyer who is chairman of the conference's executive committee, said it's premature to think the bar and the conference will divorce. "I don't think we're severing our relationship," he said. "It's more like a child moving into the backyard guest house. I think that's a good idea."

He acknowledged the relationship between the organizations needs clarification in light of court rulings and legislation. "They raise all these questions about autonomy and decision-making, how we spend our money and purview."

At the moment, however, Marsh said he feels the relationship between the conference and the State Bar is strong and friendly because "we haven't had a disagreement with the board about our resolutions."

Former conference chair Diane Wasznicky, who now serves on the task force, said the key issue is one of control. "Our argument is if it's our constituencies' money and they're doing work, it should be our right to regulate ourselves. We recognize there has to be some kind of regulation, but why can't we have control over what we do?"

She said delegates to the conference have felt muzzled since the Keller decision was handed down a decade ago.

And she said she understands the bar "is terrified that something we do will be reflected on them." That fear, she said, is now so ingrained that she feels it can't be changed, regardless of any reassurances the conference might try to offer.

She insisted the conference has learned it must exercise caution. "The one thing that's really clear is that the leadership of the conference is very aware there's no way we can go back to pre-Keller days. There has to be some kind of parameters, call it purview, on the discussions and debates."

Wasznicky also said there is a legitimate concern among delegates that the conference might not survive if it separates completely from the bar. "We want to have some kind of relationship," she said, "and we're exploring a contractual relationship with more independence on our part."

APPENDIX G

Excerpt from California Bar Journal, July 2002

www.calbar.ca.gov/calbar/2cbj/02july/index.htm

Conference of Delegates incorporates as new group

In the latest step toward separation form the State Bar, the Conference of Delegates of California Bar Associations incorporated as a nonprofit corporation to replace the existing Conference of Delegates.

A task force overseeing the conference's future also accepted several proposals to govern the new body's method of collecting dues, sharing expenses at the bar's annual meeting and how its resolutions will be considered for inclusion in the bar's legislative program. The proposals go to the board of governors by late summer.

In addition, the new CDCBA began contract negotiations with the bar to establish a new relationship between the two.

The latest developments move the conference closer to its anticipated formal split from the bar, giving it the independence it desires while at the same time protecting the bar from the kind of political fallout which has resulted from some controversial positions taken by the conference in past years.

The newly incorporated CDCBA has as its purpose "to provide an educational forum for local and speciality bar associations throughout the state of California to propose and

debate matters concerning the advancement of the science of jurisprudence and the improvement of the administration of justice" in California.

APPENDIX H

Excerpt from Conference of California Bar Associations
Website: http://www.calconference.org/about_facts.html

CDCBA Fact Sheet

Who?

CDCBA: (Conference of Delegates of California Bar Associations).

What?

CDCBA was formed as an independent 501(c)(6) non-profit corporation in 2002. It is the successor organization to the State Bar Conference of Delegates; the combined organizations have a more than 70 year history. With its new name and status, CDCBA has been reinvented and reinvigorated as the voice of the lawyers of California. Participation is open to all local, minority, statewide and specialty voluntary bar associations in California. CDCBA employs a lobbyist in Sacramento to implement its legislative program. CDCBA is funded entirely by voluntary contributions. No State Bar mandatory dues are used in its operations.